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No. 85-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN THE MATTER OF JUDITH KRAMER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

I. Does New Jersey's agency fee statute violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States by requiring the Board of Education to make nonconsensual deductions from a nonmember teacher's salary to finance a union's lobbying activities outside the collective bargaining process?

II. Does New Jersey's agency fee statute violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States by imposing, in the course of nonconsensual deductions of union service fees, a post-deduction internal union system, rather than a pre-taking governmental system, as the exclusive procedure to protect the nonmember teacher's right to her wages and freedom to use them to oppose union causes outside the collective bargaining process?

LIST OF PARTIES TO THE PROCEEDINGS

Judith M. Kramer

Boonton Board of Education

Public Employment Relations Commission

Boonton Education Association

New Jersey Education Association (NEA)

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PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Judith Kramer prays for a writ of certiorari to review the final judgment of the Supreme Court of New Jersey dated June 25, 1985. That Court held that a statute compelling financial support of union lobbying activities directed to laws related to employee occupational interests is not repugnant to the First and Fourteenth Amendments to the United States Constitution. It also held that various forms of exclusively union rebate systems afforded constitutionally adequate protection of

the nonmember's liberty and property interests at stake in nonconsensual deductions of union-calculated service fees.

OPINIONS BELOW

The opinion of the Public Employment Relations Commission is reported at *In re Boonton Bd. of Education*, 9 N.J. Public Employee Rptr. (Labor Relations Press) ¶ 14114 (July 1983) [36a].[1] The opinion and order of the New Jersey Supreme Court is reported at 99 N.J. 523, 494 A.2d 279 [2a].

JURISDICTION

The New Jersey Supreme Court entered final judgment on June 25, 1985. It followed the reasoning of the panel in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985), to hold that statutorily compelled contributions to union lobbying and statutorily mandated, exclusive union procedures for protecting nonmembers were not repugnant to the Federal Constitution. A notice of appeal was filed on July 11, 1985 [86a]. On September 17, 1985, per Justice Brennan [A-217], this Court granted an extension to and including October 23, 1985 to file this petition. The petition was filed by October 23, 1985. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The verbatim texts of the First and Fourteenth Amend-

[1] References herein to "a" pages are to the Appendix to this petition.

ments and the challenged statutory provisions, with legislative history, are presented at 88a-119a.

STATEMENT OF THE CASE

1. *Factual Background*

The 1968 Employer-Employee Relations Act (the Act), NJSA 34:13A-1, *et seq.*, grants public employees the right to organize in a unit and to conduct collective negotiations with their employer through a chosen representative [91a-92a].[2] The legislative purpose is to promote *labor peace through machinery to create and protect the process of employee-employer dispute resolution by negotiation between an exclusive representative and an employer* [90a]. The governmental interest and the duties of an exclusive representative expressed in the Act are the same as those of the National Labor Relations Act.[3]

Although the Act imposes a duty of fair representation upon a union acting as an exclusive representative, it does not require, or punish the failure of, an exclusive representative to petition the legislature, courts or executive agencies for redress of grievances. NJSA 34:13A-5.3 to -5.4. Such public bodies are not employers or participants in the collective bargaining process under the Act, *id.*,

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[2] The right to collectively bargain with the employer is strictly statutory. *Smith v. Arkansas State Hwy. Employees*, 441 U.S. 463, 464-66 (1979). The scope of the representative's power is to exercise the *statutory* collective rights of the employees. *Lullo v. International Ass'n of Firefighters*, 55 N.J. 409, 415, 426-30 (1970). *See Vaca v. Sipes*, 386 U.S. 177, 182 (1967).

[3] *See* 3a-4a and *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 220-22, 224 (1977); *compare* 29 U.S.C. § 158(d) *with* 92a-93a.

§ 3(c): they do not negotiate or execute labor contracts. They are not chargeable with unfair labor practices.

However, state law recognizes that employees join unions voluntarily to act in their self-interest, *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 165 (1978), and to exercise fundamental political rights (in contrast with statutory collective bargaining rights) to seek to influence the branches of government, *Township of West Windsor v. PERC*, 78 N.J. 98, 109, 111-15 (1978). In this latter political process, law and public policy emerge from unilateral government action in the general public interest. *Id.* On the other hand, in the collective bargaining process a contract "emerges from negotiation and . . . approval of both parties to the agreement," *Perry EA v. Perry Local Ed. Ass'n*, 460 U.S. 37, 42-43 (1983), and is limited to the unit for which it is negotiated.

The 1968 Act did not authorize "agency shop" agreements. In 1980 the unions lobbied and the legislature passed an "agency shop" type amendment [95a] for the purpose of eliminating "free riders" [4a, 103a]. The recognized governmental interest in such legislation has heretofore been to require all unit employees to share the costs an exclusive representative incurs in discharging the regulatory duties of meeting, negotiating, drafting and administering with the employer a contract containing grievance procedures and negotiated terms of employment [16a]. *Abood*, 431 U.S. at 232; *Ellis v. Railway Clerks*, 104 S. Ct. 1883, 1891-92 (1984); *Minnesota Community College Faculty Ass'n v. Knight*, 104 S. Ct. 1058, 1083 (1984). However, the 1980 amendment required the government employer to make nonconsensual deductions

from the salaries of nonunion employees to support those union lobbying activities designed to foster its policy goals and secure advantages apart from and *outside the collective bargaining process* [25a-29a]. The statute has forced employees to advance union initiatives to change some five hundred pieces of legislation. *See Olsen v. CWA*, 559 F. Supp. 754, 770 (D.N.J. 1983), *rev'd sub nom. Robinson v. New Jersey, supra.*[4]

Because Petitioner, Judith Kramer, chose not to join the organization that acted as her unit representative, the Respondent Board of Education took from her salary a fee which the organization calculated as eighty-five percent of a member's dues and which included payments to four different and increasingly remote levels of the union [46a-47a, 54a]. Despite her timely opposition to the manner and purpose of these deductions, Petitioner had recourse *only* to a postdeduction union rebate procedure. The legislature made such a union-designed and -controlled "demand-and-return" (rebate) system the exclusive means for determining the purpose and amount of nonconsensual deductions [47a-50a, 57a, 72a; 11a-12a; 106a; 114a]. The legislature expressly modeled this system after the union's remedial proposal noted in *Abood*, 431 U.S. at 242 [106a], but later held inadequate in *Ellis*,

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[4] Approximately 423,639 public employees are subject to this statute. Bureau of Census Report No. GE-81, *Public Employment in 1981*, Vol. 1, Table 7, p.13 (Aug. 1982). A similar statute forces a like number of California's civil servants to support a broad range of union lobbying activities. *Champion v. Deukmejian*, 738 F.2d 1082, 1085 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1230 (1985).

104 S. Ct. at 1890.[5] The statutory system precluded the Board of Education from a pretaking determination of the validity of the purposes or amount of the union's deduction demand. *Township of Hamilton and CWA*, PERC No. 82-121, No. CO-82-124-111 (1982); 44a, 54a, 59a.

2. *How the Federal Questions Were Raised and Finally Decided*

On November 30, 1981, Petitioner filed unfair practice charges with the Public Employee Relations Commission (PERC) against the Board of Education of the Town of Boonton, the Boonton Education Association (her exclusive representative), and its parent, the New Jersey Education Association (an affiliate of the National Education Association). Petitioner challenged the procedures for determining the purposes and amounts of fees deducted from her earnings and paid to the private association [7a-8a]. On February 9, 1982, Petitioner amended her charge to allege that NJSA 34:13A-5.5 to -5.6 was unconstitutionally overbroad in providing deductions for political and ideological purposes, including lobbying the state legislature, in violation of the First and Fourteenth Amendments to the U.S. Constitution [7a, 37a-39a].

At her PERC hearing Petitioner contended that a union demand-and-return system was inadequate and that the Constitution required a procedure whereby the

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[5] The particular rebate system applied here is the one discussed in *Robinson v. New Jersey*, 547 F. Supp. 1297, 1309-14 (1982), preliminarily enjoined, 565 F. Supp. 942 (1983), but revived when the Third Circuit vacated the preliminary injunction, 741 F.2d 598 (1984). In this case PERC investigated [47a-50a], held the association's rebate system satisfied the statute [72a], and deferred to the courts on its constitutionality.

majority representative must give notice and establish its right to a reasonable fee amount for valid purposes before a government decisionmaker *prior to its deduction*. She also contended that the statutory system: lacked official supervision; delegated to a financially interested organization power to determine her property and liberty interests; and provided an executive agency appeal board, consisting of partisan nonjudicial members, the power to finally adjudicate private rights in property and liberty based upon the subject matter of the union's expressive activities [70a]. *See also* Appellant's Brief and Appendix, Charging Party 68-111, Superior Court, Appellate Division.

PERC reviewed the statute, its legislative history and the union's rebate system. It found that the statute authorized as the exclusive procedure the union's internal demand-and-return system and that "[t]he demand and return system which the Association adopted . . . on its face satisfies NJSA 34:13A-5.6" [71a-72a]. PERC rejected the contention that, to satisfy due process, the statute must require pretaking notice with information concerning the purposes and amounts of anticipated expenditures and a meaningful opportunity to challenge the deduction in a government forum [76a n.35]. It also found that the legislature specifically authorized compelled support of lobbying to secure advantages *in addition* to those secured through collective negotiations with the public employer [59a].

Although a defendant to the constitutional challenge in *Robinson*, *supra*, where a preliminary finding of statutory unconstitutionality had already been made, PERC decided it must treat the statute as constitutional [63a,

69a; 8a].

Petitioner appealed pursuant to N.J. Civil Procedure Rule 2:2-3(a)(2) and Rule 2:10-5, under which the Appellate Division of the Superior Court "may exercise such original jurisdiction as is necessary to the complete determination" of the matter. *See Pascucci v. Vagott*, 71 N.J. 40, 53 (1976). She again raised the federal constitutional claims to include the "as applied" challenge to the rebate system. *See* Appellant's Brief, PERC's Brief at 14-17, Board's Brief at 7, NJEA's Brief at 21-55, in Superior Court, Appellate Division. On the day before oral argument in the Appellate Division, the Supreme Court of New Jersey *sua sponte* certified the federal constitutional claims to itself [3a].

The Supreme Court of New Jersey reviewed the statutory rebate scheme [4a-5a, 11a-12a, 14a n.1]. It noted that PERC held that the Association's demand-and-return system satisfied the statutory requirements [9a]. However, the Court limited its decision to the facial validity of the statute [31a].[6] It thus refused to decide the validity of the particular union system established and

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[6] The Association amended its rebate system while this case was on appeal but only the original system was part of the record. The Supreme Court of New Jersey obtained a copy of the Association's new system after oral argument and noted its terms were discussed in *Robinson*, 741 F.2d at 610-14, [31a n.4]. The Court refused, however, to consider how these particular systems, or the various other systems adopted by majority representatives pursuant to statute, "achieve the constitutionally mandated objective" [33a-34a]. The Court left the procedural determination with the union. Because the "as applied" question was sufficiently and properly raised, the final judgment of refusal to review the lower body's approval represents an attempt to frustrate this Court's jurisdiction. Nonetheless, the "as applied" question is fully before the Court. *See Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904).

applied pursuant to the statute, although that system was in the record, fully explored and approved by PERC below and examined at length in *Robinson*. It did not discuss or require a governmental procedure or traditional components of due process of law. As a supposed guarantee of "due process" the Court construed the statute to require the union unilaterally to calculate its fee "on the basis of the union's actual expenditures during the prior year" [32a]. The Court left to the union's discretion the specific means, if any, to reduce "the risk of unconstitutional uses of nonmember fees" [33a]. It held that "the demand-and-return system mandated by N.J.S.A. 34:13A-5.6 is not unconstitutional on its face" [34a].

In considering the constitutionality of the lobbying provision, the Court asked whether the statutory infringement on First Amendment rights is outweighed by a substantial governmental interest advanced by the statute [15a]. It observed that a "significant quantum of public employee rights and benefits are determined outside the collective-negotiation process." Arguing that state and local budgetary decisions and various other laws and regulations affect conditions of employment "as much as, if not more than," negotiations, it found union activities to change such laws "germane" to collective bargaining [25a-26a]. It found that fees taken for *union* objectives *outside* collective bargaining but "germane to collective negotiations or conditions of employment" promote the governmental interest in achieving stability in labor relations [27a]. It held that this state interest required "that lobbying activities . . . supported by nonmember representation fees be relevant to the occupational interests of the employees in the bargaining unit so as to avoid

impermissible infringement on first amendment rights" [28a-29a]. Although the court failed to consider either the nature of the infringement or the value of the rights affected, it concluded that the statute was not facially invalid as it furthered the state's interest "without encroaching impermissibly on the rights of free speech and association that are protected by the first amendment to the United States Constitution" [29a].

REASONS FOR GRANTING THE WRIT

1. The Court Below Decided An Important Issue Of First Amendment Law. Its Decision Directly Conflicts With This Court's Purpose To Preserve Inviolate Our Democratic System Of Government "Whose Proper Functioning Is Indispensably Dependent On The Unfettered Judgment Of Each Citizen On Matters Of Political [And Ideological] Concern." *Abood* at 243.

Although the Supreme Court of New Jersey correctly perceived the importance of *Abood* to a proper resolution of this case, it misread that case. In *Abood* this Court examined a general challenge to public sector "agency shops" and held "the impingement upon associational freedom created by the agency shop" constitutional where the purpose of the requirement of financial support is limited to reimbursement for the cost of collective bargaining. 431 U.S. at 222, 223-25. In *Ellis*, 104 S. Ct. at 1891-92, 1896, the Court reconfirmed its approval of the *general* requirement to support a regulatory actor engaged in essentially a "commercial purpose" of negotiating and administering a contract with an employer concerning the local property interests of its employees.

See Roberts v. United States Jaycees, 104 S. Ct. 3244, 3260 (1984) (O'Connor, J. concurring). *See also Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (full constitutional protection of speech on matters of public concern but not on matters of office management).

But in *Abood* the Court also found the "as applied" challenge valid and held that the "freedom of an individual to associate for the purpose of advancing beliefs and ideas" was unconstitutionally deprived by a requirement to contribute to the political or ideological activities of a union. 431 U.S. at 233-36.[7]

In *Abood* the Court based its different holdings upon distinctions between the political and bargaining processes and the incident rights and duties of each. The criterion for that distinction is not the terminology used by the state legislature or court but the process used by the parties. The basis for the distinction is important to First Amendment jurisprudence as it serves to protect liberty. Yet no justice of the New Jersey Supreme Court understood *Abood's* fundamental distinction between the value of freedom to choose to support the required tasks of an exclusive representative proposing a contract in an area traditionally subject to government regulation, on the one hand, and freedom to choose to support activities of

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[7] "Although the right to petition and right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 105 S. Ct. 1524, 1533 n.11 (1985). The freedom of association and disassociation "receives protection as a fundamental element of personal liberty" because it advances "those activities [speech and petition] protected by the First Amendment." *Roberts*, 104 S. Ct. at 3249. That these activities depend upon "the expenditure of money" neither introduces a nonspeech element nor reduces the "exacting scrutiny" in the analysis required by the First Amendment. *First National Bank v. Bellotti*, 435 U.S. 765, 786 n.23 (1978).

a political nature or to advocate matters of public concern, on the other hand. *Abood* held that compelled association for the purpose of collective bargaining does not violate the "freedom of an individual to associate" for protected purposes, but that compelled association for the purpose of contributing to union political and ideological activities does. 431 U.S. at 215, 232-33, 235-36. In fact "union expenditures for legislative lobbying" was one of the two types of ideological activities which occasioned the latter holding. *Id.* at 271; *see also id.*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326; *IAM v. Street*, 367 U.S. 740, 769 n.17, 777 (1963).

In contrast to *Abood* the issue here has matured beyond a challenge to the *bare* power of a legislature to require that non-union public employees contribute to a union's bargaining activities, or even to the "as applied" power of a union to use compulsory fees for political and ideological activities. The New Jersey statute *expressly* forces nonmembers to finance a union's exercise of the fundamental political right to petition and *pro tanto* simultaneously deprives those nonmembers of their ability to contribute to their own causes! Substantively and procedurally, the New Jersey statute commands just what *Abood* proscribed! Nevertheless, the legislature and state court purported to follow *Abood* to this unprecedented invasion of the political autonomy and self-determination of each citizen.

The legislature here *compelled* nonmembers to finance a union's efforts to influence the public policy of the state. It acted without differentiating statutorily established bargaining rights and duties from constitutionally protected ones. In approving this statute the lower court

ignored both its impact upon the individual's First Amendment rights and the government's duty to scrupulously protect those rights. The Court apparently agreed with the *Robinson* holding that "lobbying has no different constitutional implication from any other form of union activity" that a citizen may be compelled to finance so long as the lobbying is relevant to employee interests [28a-29a & n.3]. But a union's interest in the subject matter of the law as "germane" to employee interests cannot justify the infringement here. That laws impact on employee interests or that the union has an economic motivation for lobbying [26a], "would clearly be insufficient by itself" to reduce the protection afforded by the First Amendment. *See Bolger v. Youngs Drug Products*, 463 U.S. 60, 66-67 (1983); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-38 (1961).

The very process of lobbying the government to make or change law constitutes speech on "matters of public concern . . . at the heart of the First Amendment's protection." Such speech is the essence of self-government and "among the most precious of the liberties safeguarded by the Bill of Rights." The First Amendment stands precisely as an assurance of this "particular freedom of expression" as it is an "interrelated component[ ] of the public's exercise of *its* sovereign authority." *McDonald v. Smith*, 105 S. Ct. 2787, 2789-94 (1985). "[T]he values in the right of petition as an important aspect of *self*-government are beyond question." *Id.* at 2790.

The union's private interest in resorting to the legislature on various employment-related issues of concern to

it hardly justifies abridgement of the sovereign will of the individual nonunion employees or transfer of their political independence to the policymaking power of some legislatively favored private group. This Court has squarely rejected such an effort to restrict core First Amendment freedoms by distorting the distinction between collective bargaining and protected activities. *See Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174-76 & n.10 (1976). The constitutional right of union members to pursue their own interests is not a constitutional guarantee of advantage to them over others who choose nonmembership or allegiance to different, even adverse, associations. *See Lincoln Federal Labor Union v. Northwestern I & M Co.*, 335 U.S. 525, 530-33 (1949).

The lower court distorted the necessary constitutional inquiry into the nature of the restriction and rights affected. It asserted a broad governmental interest and simultaneously shifted the focus of the collective bargaining process from contract negotiation to union lobbying for public policies on behalf of its employee members. In so doing the court failed to distinguish private interests from the public interest in the elimination of free riders in the bargaining process, or to differentiate between statutory collective bargaining rights and duties, which government may regulate, and those superior constitutional rights which it may not. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48-49, 91 n.124 (1976); *Central Hudson Gas & Electric v. PSC*, 447 U.S. 557, 562 n.5 (1980). But the legitimate state interest in the agency shop here is no different than it was in *Abood* or *Ellis*, where this Court held that the law could obligate nonunion employees to share only those union expenditures "necessarily or rea-

sonably incurred for the *purpose* of performing the *duties* of an *exclusive representative of the employees in dealing with the employer on labor-management issues.*" *Ellis*, 104 S. Ct. at 1892 (emphasis added).

In one line of cases this Court considered and voided, despite substantial governmental interests, state limitations upon the individual's freedom to contribute or expend funds to advance public policies, ideas or legislation. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Bellotti, supra*; *see also Buckley*, 424 U.S. at 48-51. In other cases this Court required that the line between regulated and protected speech or association not be based either upon the subject matter of the speech or the status of the speaker. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Consolidated Edison v. PSC*, 447 U.S. 530, 537-38 (1980). The Supreme Court of New Jersey apparently thought these cases irrelevant, because it ignored all of them. It thus approved a statute that requires nonmembers to contribute to a union's viewpoint on debatable public questions and that bases whether such compulsory support is necessary on grounds that the message conveyed in a political or ideological cause is, or is not, "only incidentally related to terms and conditions of employment" [95a-96a]. It also left a government board with the final decision to restrict liberty based upon the agreement of the subject matter of a political or ideological cause with the statutory standard [104a, 106a]. This Court held previously that such an exercise of legislative power is wholly foreign to the First Amendment. *Buckley*, 424 U.S. at 48-49; *Bellotti*, 435 U.S. at 784-86; *Regan v. Time*, 104 S. Ct. 3262, 3266-67 (1984).

The decision below represents a shift of power from the individual to a majoritarian private interest group favored by the state legislature. This is repugnant to democracy. It thus endangers the very principles of political and ideological liberty this Court sought to preserve in *Abood*. The First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth place "[o]ne's right[s] to free speech", petition, and association beyond the reach of majorities and legislatures. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

In short, the decision of the New Jersey Supreme Court is impossible to justify on any reasoned basis and supports a forbidden intrusion upon an individual's freedoms of expression. The decision is in substantial conflict with the individual's power to exercise the freedom of petition and association to bring about, refrain from, or oppose political and social change. It merits swift summary reversal by this Court. *Cf. Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (summarily reversing Utah Supreme Court decision for inconsistency with this Court's clear Fourteenth Amendment rulings).

2. The Procedural Due Process Question Is Important And Presents Variation Of The Issue Currently Under Consideration In *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984) *cert. granted*, 105 S. Ct. 2700 (1985).

The Supreme Court of New Jersey declared the exclusive, union-controlled "demand and return" procedure required by the instant statute constitutionally valid. It thus approved a statute that delegates to private orga-

nizations the Fourteenth Amendment function of government in an area where serious potential for self-serving action exists. It left the form and components of the system to be determined by various *union policies* and the adventitious success of future employee challenges to them [33a-34a]. It held adequate to prevent mistaken or arbitrary deductions a judicial requirement that the *union* unilaterally "compute the annual representation fee . . . on the basis of the union's actual expenditures . . . to exclude that percentage of the union's prior year budget attributable to expenses that the law prohibits the union to charge to nonmembers" [32a-33a]. It left the burden upon the non-union employee, rather than the government or union, to come forward and take lengthy steps to protect her liberty and property interests. Thus, it denied Petitioner a procedure where there is adequate pretaking notice to affected individuals and where the union must *factually establish* the validity of its mandatory fees before a neutral governmental body prior to any deductions.

The *state's* duty under the "due process *of law*" provision of the Constitution is to prevent the existence of a "wide gulf between the responsibility for the use of . . . power and the actual exercise of that power." *Watkins v. United States*, 354 U.S. 178, 205 (1957). *See also Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Procedural protections avoid that gulf—avoid mistaken or arbitrary deprivations—by *informed governmental* decisionmaking. The necessity for procedures, moreover, is not dependent upon the presumptive validity of the results without procedures. *See Cleveland Bd. of Ed. v. Loudermill*, 105 S. Ct. 1487, 1494-95 (1985). Due process is a *legal* proceeding *held and enforced by public authority* in

furtherance of the general public good. *Brown v. New Jersey*, 175 U.S. 172, 176 (1899). The fact that there may be an adequate legal decision later on appeal does not satisfy the Constitution. *Northern Pipeline Const. v. Marathon Pipeline Co.*, 458 U.S. 50, 67-70, 76-78, 80-83 nn.33-34, 84-86 & n.39 (1982). The official decisionmaker must be neutral, detached and provided in the first instance. *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973).

A "root requirement" of the Due Process Clause is "that an individual be given an opportunity for hearing *before* he is deprived" of protected interests. *Loudermill*, 105 S. Ct. at 1493. That requirement is especially applicable here. Unlike a statute for compulsory financing of legislative appropriations for exclusively governmental purposes, *Buckley*, 424 U.S. at 91 n.124, the instant statute authorizes a private group to demand and receive involuntary financial support from nonmembers measured by the purposes and activities advanced through the members' dues. NJSA 34:13A-5.5(b) [95a]. The only substantive limitation upon these nonconsensual collections is the exclusion of assessments that "have only a distant and tenuous link with negotiations or conditions of employment" [27a, 33a]. The risks that deductions made according to this vague criterion will result in arbitrary and erroneous deprivations of nonunion employees' rights in property and liberty are, consequently, substantial. *See Branti v. Finkel*, 445 U.S. 507, 513 n.8, 517 (1980); *Ellis*, 104 S. Ct. at 1898 (Powell, J. concurring).[8]

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[8] The lower court presumed that the risk of improper deductions would be minimized if the union, which has an interest in maximizing the amount of the fee, *itself* computes the current year's fee from its own records for the prior year. Even were this unwarranted and unrealistic

The government has an interest both to assure payment of a *valid* service fee and *to protect* the rights of its employees. It has an additional interest in keeping public service free of the appearance of government pressures to conform to union political or ideological preferences. *Novosel v. Nationwide Ins.*, 721 F.2d 894, 899-900 (3d Cir. 1983). The government, therefore, shares the employees' concern for adequate, precollection procedures. Because, in the course of a regularized government practice such as that involved here, the *government* is in a position to provide predeprivation process, the Constitution dictates that it do so. *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984).

In *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192, 1194, 1196-97 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 2700 (1985) and *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-82 (1982), the courts focused expressly on the constitutional duty of government to provide an advance determination of an assessment by a governmental decisionmaker. These decisions advance the salutary purpose "to devise a way of preventing compulsory subsidization of ideological activity" and to avoid the dubious choice to relinquish either one's "right to withhold" support or "freedom to maintain [one's] own beliefs." *Abood*, 431 U.S. at 241, 244.

The present delegation of power in the first instance to an interested union to unilaterally determine facts affecting the fundamental interests of the nonmember cannot comport with the principles of due process. *See Fuentes*

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presumption true, the necessity for "due process" exists regardless of the validity of union accounting. *See Loudermill*, 105 S. Ct. at 1494.

v. Shevin, 407 U.S. 67, 80-82, 91-93 (1972). Postdeduction returns of monies and partisan board review of the subject matter of political activities to decide the amount properly rebated hardly protect the interests at risk at the time of deduction. The statute, moreover, is tantamount to a requirement that nonmembers participate in an internal union adjudicatory system in order to protect their fundamental right not to associate with that organization.

Unlike the situation in *Hudson* and *Greenfield*, the statute mandated an exclusive union-controlled procedure. This procedure fails to provide minimum due process guarantees and, in addition, *imposes* a particular system which violates the tenets of due process and First Amendment law. *Ad hoc* union policies cannot fill the constitutional void created by the statute approved in the decision below. Because this statute is the exclusive source of procedures, but is devoid of the essential components of "due process of law", the decision of the Supreme Court of New Jersey must be reversed.

CONCLUSION

The decision below upholding the substantive and procedural provisions of the New Jersey agency fee statute should be summarily reversed. Alternatively, for all the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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APPENDICES

APPENDIX A-1

Opinion of the
Supreme Court of New Jersey
in *In re Boonton Board of Education,*
June 25, 1985

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF BOARD OF EDUCATION OF THE TOWN OF BOONTON,

Respondent,

and

JUDITH M. KRAMER,

Appellant.

BOONTON EDUCATION ASSOCIATION AND NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

and

JUDITH M. KRAMER,

Appellant.

A-124
Argued:
January 21, 1985
Decided:
June 25, 1985

On certification to the Public Employment Relations Commission.

The opinion of the Court was delivered by STEIN, J.

This appeal challenges the constitutionality of the 1979 amendments to the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.1 to -21, as amended, *L.*1979, *c.*477. The amendments authorize agreements between majority union representatives and public employers that require nonunion public employees to pay their majority representative a representation fee for services rendered. *N.J.S.A.* 34:13A-5.5 and -5.6. The constitutional challenges were initially asserted by appellant, Boonton public schoolteacher Judith Kramer, when she

filed unfair labor practice charges with the New Jersey Public Employment Relations Commission (PERC) against her employer, the Boonton Board of Education (Board), her majority representative, the Boonton Education Association (BEA), and the New Jersey Education Association (NJEA). PERC granted in part and denied in part the relief sought by appellant, but declined to rule on the constitutional issues raised. This Court certified the matter directly while her appeal was pending in the Appellate Division. _____ *N.J.* _____ (1984).

I

In 1968 the Legislature passed the New Jersey Employer-Employee Relations Act (the Act). *L.*1968, *c.*303. This Act granted to all public employees the right to join or refrain from joining employee organizations, and the right to conduct collective negotiations with public employers through majority representatives. *N.J.S.A.* 34:13A-5.3.

The avowed purpose of the Act was to foster the prevention and prompt settlement of labor disputes in the private and public sectors. *N.J.S.A.* 34:13A-2. To that end, the Act authorized majority representatives to negotiate agreements with public employers on behalf of the employees in the relevant bargaining unit. *N.J.S.A.* 34:13A-5.3. It further required that the majority representative "be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership." *Id.* Accordingly, the Act afforded the bargaining unit's non-union public employees substantial benefits from the

majority representative, without any cost obligation. See Sponsors' Statement, N.J. Assembly Bill No. 688, Feb. 9, 1978. The Act also established PERC. *N.J.S.A.* 34:13A-5.2. This administrative body was granted exclusive jurisdiction over unfair labor practices in the public sector and was authorized to make policy and establish rules and regulations governing employer-employee relations in public employment. *N.J.S.A.* 34:13A-5.2, -5.4.

Effective July 1, 1980, the Legislature amended the Act to authorize agreements between public employers and majority representatives that would require employees who were not members of the majority representative to pay a representation fee not exceeding 85% of regular membership dues, fees, and assessments. *L.*1979, *c.*477, § 2. The Sponsors' Statement clearly indicated that the purpose of the amendment was to eliminate the "free ride" enjoyed by nonunion members of the bargaining unit who received the benefit of services performed by the majority representative without sharing in the costs incurred. Sponsors' Statement, Assembly Bill No. 688, *supra*. The Statement cited *Abood v. Detroit Bd. of Educ.*, 431 *U.S.* 209, 97 *S.Ct.* 1782, 52 *L.Ed.*2d 261, reh'g denied, 433 *U.S.* 915, 97 *S.Ct.* 2989, 53 *L.Ed.*2d 1102 (1977), as authority for requiring nonunion members to help meet the costs of services rendered by the union.

Consistent with *Abood*, the statute required that the majority representative refund to nonunion employees any part of the representation fee used "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any

other benefits available only to members of the majority representative." *N.J.S.A.* 34:13A-5.5(c). This refund, however, was not to reflect "the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." *Id.*

The amended Act authorized public employers to withhold the representation fee by payroll deduction, but only if the union had established and maintained a "demand and return" system that provided a pro rata refund of those expenditures that the statute expressly determined should not be shared by nonunion member employees. *N.J.S.A.* 34:13A-5.6. The statute also required that the demand-and-return system provide for a procedure to review the amounts refunded, with the burden of proof on the majority representative. *Id.* The statute further provided that nonunion members have the right to appeal to a three-member board, consisting of a representative of public employers, a representative of public employee organizations, and a neutral member. *Id.*

II

In June, 1981, pursuant to *N.J.S.A.* 34:13A-5.5, the Board and the BEA entered into an agreement that obligated Kramer, as a nonunion member of the negotiating unit, to pay a representation fee to the BEA commencing September, 1981. Although the BEA posted notices on

September 22, 1981, informing members of the negotiating unit of the amount of the representation fee and a rebate procedure, Kramer claimed to have first learned about the representation fee in a letter from the BEA dated October 7, 1981. This letter invited her to become a member of the BEA and advised her that pursuant to *L.*1979, *c.*477, all members of the negotiating unit who chose not to join the BEA would be required to pay a representation fee in lieu of dues. After receiving the letter, she asked a representative of the BEA for a written statement of the amount of the representation fee and for a copy of the contract authorizing the fee. According to Kramer, the statement was never furnished but a copy of the contract was given to her in December, 1981.

Shortly after receiving the letter from the BEA, Kramer notified the superintendent of schools that she refused to authorize payroll deductions for the representation fee since she had not seen a copy of the contract or of the demand-and-return system mandated by statute. In fact, the BEA had adopted a demand-and-return system on September 30, 1981 and had posted a copy on the bulletin board in the faculty room on or about October 1, 1981.

Commencing February 1, 1982, the Board began deducting $74.16, an amount equal to twice the monthly representation fee, from Kramer's salary. This double deduction was made in order to recover the fees payable for the first five months of the school year—September through January—when no fees had been deducted.

In November, 1981, Kramer filed an unfair labor prac-

tice charge with PERC alleging that the Board had engaged in unfair practices by putting into effect an automatic payroll deduction for dues without signed authorization cards, thereby interfering with her right to refrain from union activity, in violation of *N.J.S.A.* 34:13A-5.3 and -5.4, and *N.J.S.A.* 52:14-15.9(e). Kramer also alleged that the Board had imposed automatic payroll deductions for the representation fee without requiring the pre-establishment of a demand-and-return system, in violation of *N.J.S.A.* 34:13A-5.6. Simultaneously, Kramer filed unfair practice charges against the BEA and the NJEA, alleging that they had interfered with her rights under *N.J.S.A.* 34:13A-5.3. and -5.4 by refusing to allow her to see the agreement; by intimidating her from exercising her right to refrain from union activity; by demanding that she become a member of the union; by imposing a procedure for the automatic payroll deduction of representation fees without the establishment of a demand-and-return system in violation of *N.J.S.A.* 34:13A-5.6; by imposing a procedure for the automatic payroll deduction of dues without signed authorization cards, in violation of *N.J.S.A.* 52:14-15.9(e); and by establishing an agency-fee system that charged certain union members lower amounts than certain nonmembers, reflecting a discriminatory dues system.

In February, 1982, Kramer filed an amended unfair practice charge against the BEA and NJEA, alleging that their attempt to collect the representation fee had violated her constitutional rights to freedom of speech and association. She also alleged that the representation fee was "unconstitutionally broad," since it could be used not only to pay for activities related to bargaining and con-

tract administration, but also to subsidize lobbying activities in support of various partisan political and social issues.

In September, 1982, a hearing was held before a PERC hearing examiner, who issued his recommended report and decision in March, 1983. *In re Boonton Bd. of Educ.*, 9 *N.J. Public Employee Rptr.* (Labor Relations Press) ¶ 14114 (Gerber, Hearing Examiner, March 25, 1983). The BEA, NJEA, and Kramer filed exceptions to the hearing examiner's recommendations. PERC issued its decision and order in July, 1983. *Id.*, ¶ 14199 (Public Employment Relations Commission, Decision and Order, July 18, 1983).

PERC first determined the jurisdictional issues: it concluded that constitutional challenges to the representation fee statute were within the exclusive province of the courts; that the three-member appeals board had sole jurisdiction over matters pertaining to the amount of any representation-fee rebate; and that PERC alone had jurisdiction over unfair labor practice claims that did not challenge the amount of the rebate or the constitutionality of the rebate system. *Id.*, ¶ 14199, at 478-79.

On the basis of this jurisdictional finding, PERC concluded that the hearing examiner had properly refused to entertain Kramer's constitutional challenges to the statute. Moreover, PERC held that the hearing examiner had properly quashed a subpoena *duces tecum* served by Kramer that sought the production of all documents pertaining to the operation of the demand-and-return system and the calculation of the representation fee. PERC

found these matters to be within the exclusive jurisdiction of the appeals board. *Id.*

PERC further determined that the demand-and-return system adopted on September 30, 1981 satisfied the statutory mandate. It found, however, that the deduction of representation fees from Kramer for the month of September, 1981 constituted an unfair labor practice since the BEA had not established its demand-and-return system until September 30, 1981. *Id.* at 479; *see N.J.S.A.* 34:13A-5.6. PERC disagreed with the hearing examiner's finding that the BEA had not interfered with, restrained, or coerced Kramer in the exercise of her right not to join the BEA. PERC found that the BEA letter of October 7, 1981 was potentially misleading, that the BEA membership chairman had refused to give Kramer a written statement concerning her representation fee, and that an NJEA representative had advised Kramer that he did not have to discuss representation fees with a nonmember. *In re Boonton, supra*, 9 *N.J. Public Employee Rptr.* ¶ 14199, at 479-80. PERC found such statements to reflect an "unacceptably grudging attitude towards the rights of non-members to refrain from joining the Association and to secure information concerning the representation fee system." *Id.* at 480. PERC further found that the BEA had committed an unfair labor practice in failing to notify Kramer and other nonunion members personally of their rights under the demand-and-return system and of the procedures for obtaining a rebate. *Id.*

With respect to the challenge asserted to the fee structure, PERC rejected Kramer's contention that the dis-

tinction between fees paid by nonunion teachers and union support staff was discriminatory or otherwise unlawful. PERC also held that it was an unfair labor practice to require Kramer's representation fee to be withheld from her paycheck rather than to allow her to pay it in a lump sum. *Id.*

III

On appeal, appellant renews her constitutional challenge to the validity of the statute and the demand-and-return system established thereunder. She also challenges PERC's holding that the hearing examiner properly quashed the subpoena for financial information and properly refused to consider the purposes for which representation fees were being expended. Finally, in this appeal, appellant argues for the first time that the BEA practice of transmitting a portion of her representation fee to county, state, and national unions constitutes an unfair labor practice.

We first address appellant's contention that PERC improperly upheld the quashing of her subpoena of BEA and NJEA financial records. Appellant argues that PERC's jurisdiction under the statute is sufficiently broad to accommodate the inquiry that the subpoena was designed to pursue. Although this Court is not bound by PERC's determination of its own jurisdiction, an administrative agency's interpretation of a statute it is charged with enforcing is entitled to substantial weight. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 575 (1978); *In re Application of Saddle River*, 71 *N.J.* 14, 24 (1976).

In this instance, PERC's interpretation is consistent with our own conclusion as to the intent of the Legislature. As noted above, the subpoena sought to compel production of all BEA and NJEA records pertinent to the calculation of the representation fee, the refundable amount, and the cost of activities related to collective negotiations. In quashing the subpoena, the hearing examiner concluded, and PERC agreed, that the purpose of the subpoena was to discover what constituted an appropriate representation fee to be charged by the majority representative. *In re Boonton, supra*, 9 *N.J. Public Employee Rptr.* ¶ 14114, at 251 n.5; *id.* ¶ 14199, at 479. PERC determined that the appropriateness of representation fees was a matter expressly delegated by the Legislature to the appeal board established pursuant to the statute. *Id.*, ¶ 14199, at 478; *see N.J.S.A.* 34:13A-5.6. PERC supported its jurisdictional analysis by citing legislative history that revealed that an early draft of the legislation had empowered PERC to resolve all challenges to the amount of the representation fee. *In re Boonton, supra*, 9 *N.J. Public Employee Rptr.* ¶ 14199, at 478; see Assembly Labor Committee Statement, Assembly Bill No. 688, June 19, 1978. This concept was modified by Assembly Labor Committee amendments, which substituted a three-member board for PERC as the body that would hear and determine challenges to the amount of the fee. The Committee Statement to the bill underscores the legislative intent to deny PERC jurisdiction over disputes concerning representation fees:

> The Public Employment Relations Commission had indicated to the Committee that the role originally intended for it as an arbiter of fee challenges would have placed a heavy administrative burden

> on it and slowed its processing of unfair labor practice charges as well as scope of negotiation and unit determinations. At the urging of a coalition of public employee associations and unions, the committee amended the bill along the lines of a recommendation contained in the U.S. Supreme Court's "*Abood*" decision * * *, which upheld the constitutional validity of state "agency shop" legislation. * * *
>
> Under the terms of the bill, as amended, nonmembers can appeal the amount of any union-determined rebate by bringing their cases (individually or collectively) before a three-member tripartite board with staggered terms which would be appointed by the Governor with the advice and consent of the Senate. [Assembly Labor Committee Statement, *supra.*]

In the face of this clear legislative history, we find no error in PERC's conclusion that the subpoena *duces tecum* was properly quashed because the information it sought to obtain was not relevant to matters within its jurisdiction.

Appellant's next contention is that the BEA's practice of transmitting a portion of her representation fee to labor organizations that are affiliated with her majority representative constitutes an unfair labor practice. Respondents contend that appellant did not charge this issue as an unfair labor practice in her original complaint, nor was this issue raised by the evidence presented before the hearing examiner. We have examined the record and conclude that appellant's challenge to the dues structure before PERC was limited to the allegation that the difference between the fees charged nonunion

members of the teaching staff and union members of the support staff was discriminatory. PERC rejected that challenge and appellant does not seek review of that determination here.

It is a well-settled principle that appellate courts should decline to consider issues not fully presented at trial unless the issues are jurisdictional or concern matters of great public interest. *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234 (1973). Appellant's failure to produce evidence regarding the majority representative's transmittal of a portion of her representation fee to affiliated labor organizations may have induced respondents to refrain from presenting rebuttal or explanatory evidence. *See Kleinberg v. Schwartz*, 87 *N.J. Super.* 216, 226 (App. Div. 1965), aff'd, 46 *N.J.* 2 (1966). We have carefully reviewed the record of the proceedings before the hearing examiner and are satisfied that there is an insufficient factual basis to warrant our consideration of this issue on the record presented.

IV

We turn now to the constitutional challenge leveled against the statutory provision that authorizes agreements requiring nonunion members to pay a representation fee to their majority representative. We consider this challenge to be directed to the facial validity of the statute in the context of first-amendment guarantees. The record before us does not permit consideration of the precise manner in which the statutory authorization to collect and expend the representation fee was imple-

mented.[1] Moreover, the Court was advised at oral argument that the BEA demand-and-return system introduced into evidence has since been terminated and replaced with a new demand-and-return system, which is not part of the record.

Appellant's challenge to the statute focuses on the provision that permits nonmember fees to be applied to certain lobbying expenditures. *N.J.S.A.* 34:13A-5.5(c). Appellant asserts that her rights to freedom of speech and association under both the United States and New Jersey Constitutions have been infringed because use of her representation fee is not limited to activities related to bargaining and contract administration, but could also cover lobbying activities for political and social issues not related to bargaining. Accordingly, appellant does not object to the requirement that she bear part of the cost of the various collective negotiation efforts that benefit members and nonmembers alike. She does object, however, to the use of her representation fee for lobbying activities, because that use may result in her fee being applied to objectives that she may oppose and with which she may desire not to be associated.

Prior to the 1979 amendments to the Act, in *New Jersey Turnpike Employees' Union v. New Jersey Turnpike Auth.*, 64 *N.J.* 579 (1974), aff'g per curiam 123 *N.J.*

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[1] As discussed above, PERC properly upheld the quashing of appellant's subpoena *duces tecum* for the production of financial records. The records sought related to the calculation of the representation fee and rebate, including a breakdown of the union's expenditures. Because these matters fall within the exclusive jurisdiction of the statutory appeal board, appellant was unable to develop a record before PERC on these issues.

Super. 461 (App. Div. 1973), this Court considered the validity of a provision in an agreement that compelled nonunion public employees to contribute to their majority representative's direct costs of collective negotiations and the processing of grievances. The Court invalidated the provision, reasoning that it deprived the nonunion employees of their statutory right to refrain from union activity without any fear of penalty. *Id.*; *see N.J.S.A.* 34:13A-5.3. The 1979 amendments to the Act, however, modified the existing law by authorizing agreements that required nonunion members of the majority representative to contribute to the cost of activities connected with collective negotiations. It is the validity of this legislation that we are called upon to review here.

In considering appellant's attack on the constitutionality of the 1979 amendments, we are mindful that the presumption of validity that usually attaches to a legislative enactment is unavailable when the statute is challenged on first-amendment grounds. *United States v. C.I.O.*, 335 *U.S.* 106, 140, 68 *S.Ct.* 1349, 1366, 92 *L.Ed.* 1849, 1870-71 (1948) (Rutledge, J., concurring); *Thomas v. Collins*, 323 *U.S.* 516, 529-532, 65 *S.Ct.* 315, 322-323, 89 *L.Ed.* 430, 440-41, reh'g denied, 323 *U.S.* 819, 65 *S.Ct.* 557, 89 *L.Ed.* 650 (1945); *New Jersey Chamber of Commerce v. New Jersey Election Law Enforce. Comm'n*, 82 *N.J.* 57, 70 (1980). Our inquiry must be to determine if the statute permits an infringement on first-amendment rights, and to the extent that it does, whether or not such infringement is clearly outweighed by a significant or substantial governmental interest that is advanced by the statute in question. *See NAACP v. Alabama*, 357 *U.S.* 449, 463-65, 78 *S.Ct.* 1163, _____ , 2 *L.Ed.*2d 1488,

1500-01 (1958); *American Communications Ass'n v. Douds*, 339 *U.S.* 382, 399-400, 70 *S.Ct.* 674, _____ , 94 *L.Ed.* 925, 944 (1950); *Schneider v. Irvington*, 308 *U.S.* 147, 161, 60 *S.Ct.* 146, _____ , 84 *L.Ed.* 155, 164-65 (1939); *cf. New Jersey Chamber of Commerce*, *supra*, 82 *N.J.* at 70 (in first-amendment overbreadth challenge, inquiry is whether there exists a compelling state interest that is substantially served by the statute and that clearly outweighs repressive effect on first-amendment rights).

The Sponsors' Statement to the 1979 amendments to the New Jersey Employer-Employee Relations Act suggests that the governmental interest advanced by the bill is the provision of a fair-share formula for nonunion member payroll deductions so that the cost of union services that benefit both union and nonunion alike will not burden unfairly the members of the union. This governmental interest must be assessed in the context of the underlying purpose of the New Jersey Employer-Employee Relations Act, namely, to foster the prevention and prompt settlement of labor disputes in the public and private sector. *N.J.S.A.* 34:13A-2. This purpose was implemented by the statutory authorization of public employee unions and the requirement that they negotiate for all employees in the unit, regardless of union membership status. *N.J.S.A.* 34:13A-5.3. The original statute and its 1979 amendments demonstrate a state interest in promoting stability in public-sector employment by authorizing majority-unit representation of all employees for collective negotiations and grievance procedures, with the cost to be shared equitably among members and nonmembers.

Given this governmental interest, our task is to ascertain if the statute in its probable application can be sustained in the face of the first-amendment rights that it affects. In undertaking this assessment, our clear duty is to construe the statute in a manner that would uphold its constitutionality if it is reasonably susceptible to such a construction. *New Jersey Bd. of Higher Educ. v. Shelton College*, 90 *N.J.* 470, 478-79 (1982); *State v. Profaci*, 56 *N.J.* 346, 349-50 (1970); *Woodhouse v. Woodhouse*, 17 *N.J.* 409, 416 (1955).

The basic issue of the constitutionality of a statute mandating nonmember financial support for union activities was first addressed by the United States Supreme Court in *Railway Employes' Dep't v. Hanson*, 351 *U.S.* 225, 76 *S.Ct.* 714, 100 *L.Ed.* 1112, stay denied, 351 *U.S.* 979, 76 *S.Ct.* 1044, 100 *L.Ed.* 1494, reh'g denied, 353 *U.S.* 859, 77 *S.Ct.* 22, 1 *L.Ed.*2d 69 (1956). In *Hanson*, nonunion employees of the Union Pacific Railroad Company sued their employer and labor organizations representing railroad employees to enjoin enforcement of a union-shop agreement under which, as a condition of continued employment, all employees were required to become members of a specified union within sixty days. This union shop agreement was entered into pursuant to a 1951 amendment to the Railway Labor Act adopted by Congress for the purpose of insuring that "those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." *Id.* at 231, 76 *S.Ct.* at _____ , 100 *L.Ed.* at 1130. The Court recognized the presence of important first-amendment issues:

> Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology. [*Id.* at 236-37, 76 *S.Ct.* at ____, 100 *L.Ed* at 1132-33 (footnotes omitted).]

Notwithstanding these first-amendment concerns, the *Hanson* Court upheld the union-shop agreement, concluding that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate * * * the First * * * Amendment * * *." *Id.* at 238, 76 *S.Ct.* at ____, 100 *L.Ed.* at 1134.

Subsequently, in *International Ass'n of Machinists v. Street*, 367 *U.S.* 740, 81 *S.Ct.* 1784, 6 *L.Ed.*2d 1141 (1961), the Court was confronted with a challenge to the constitutionality of the union-shop provisions of the Railway Labor Act, not with respect to the basic authorization of the union shop but rather regarding dues paid by the plaintiffs pursuant to the union-shop agreement that were being used "to finance the campaigns of candidates for federal and state offices whom [plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [plaintiffs] disagreed." *Id.* at 744, 81 *S.Ct.* at ____, 6 *L.Ed.*2d at 1147. The Court in *Street* avoided

the constitutional issue by construing the Railway Labor Act to preclude the challenged use of funds:

> We respect [the] congressional purpose when we construe [the statute] as not vesting the unions with unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified. [*Id.* at 768, 81 *S.Ct.* at _____ , 6 *L.Ed.*2d at 1160-61.][2]

In *Brotherhood of Ry. Clerks v. Allen*, 373 *U.S.* 113, 83 *S.Ct.* 1158, 10 *L.Ed.*2d 235 (1963), the Court considered the appropriateness of injunctive relief to protect the first-amendment interests of employees who objected to their union's use of dues for political objectives unrelated to collective bargaining. The Court held

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[2] Justice Frankfurter in his dissent expressed the view that Congress intended to make no distinction between expenditures for collective bargaining and expenditures for political purposes, asserting that "[t]he notion that economic and political concerns are separable is pre-Victorian." *Street*, 367 *U.S.* at 814, 81 *S.Ct.* at _____ , 6 *L.Ed.*2d at 1187 (Frankfurter, J., dissenting).

that it was improper for state courts to enjoin the collection of all membership dues because part of the union's expenditures was devoted to political purposes not authorized by the Railway Labor Act. *Id.* at 119-20, 83 *S.Ct.* at _____ , 10 *L.Ed.*2d at 240. Instead, the Court suggested two practical measures by which the union could avoid constitutional conflicts. First, the Court proposed the establishment of a refund system that would return to each dissenting employee the percentage of his mandatory contribution that equaled the ratio that union political expenditures bore to total union expenditures. Second, the Court suggested that future mandatory contributions from such employees be adjusted prospectively by a similar factor. *Id.* at 122-23, 83 *S.Ct.* at _____ , 10 *L.Ed.*2d at 242.

Hanson's recognition of the legitimate governmental interest in eliminating the "free ride" problem was first applied to public employee unions in *Abood v. Detroit Bd. of Educ.*, *supra*, 431 *U.S.* 209, 97 *S.Ct.* 1782, 52 *L.Ed.*2d 261. In *Abood*, a Michigan statute required every public employee in a bargaining unit represented by a union to pay as a condition of employment a service fee equal to union dues. The plaintiffs challenged the agency-shop requirement in general and specifically the use of their service fees to support political programs unrelated to their collective bargaining agreements and to which the plaintiffs were opposed.

The *Abood* Court restated the basic first-amendment issue implicated when employees were compelled to pay a service fee to support collective-bargaining expenses of a labor union to which they did not belong:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. [*Id.* at 222, 97 *S.Ct.* at _____, 52 *L.Ed.*2d at 276.]

In *Abood*, the employees sought to distinguish the *Hanson* and *Street* decisions on the ground that employees in the public sector were being required to pay dues as a condition of public—not private—employment; that collective bargaining in the public sector is inherently political; that a public employee union, to represent the interests of its employees, engages in political lobbying activities in order to affect the decisions of the governmental representatives, and such lobbying activities

necessarily infringe upon first-amendment rights. The issue, said the Court, was "whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation." *Abood*, 431 *U.S.* at 229, 97 *S.Ct.* at _____ , 52 *L.Ed.*2d at 280. Sustaining the Michigan statute, the Court concluded:

> The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned with its policy implications agree that "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector. . . . No special dimension results from the fact that a union represents public rather than private employees." * * * We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in Hanson and Street as controlling in the present case insofar as the service charges are applied to collective bargaining, contract administration, and grievance adjustment purposes. [*Id.* at 232, 97 *S.Ct.* at _____ , 52 *L.Ed.*2d at 282.]

With respect to appellant's challenge to expenditures of a political nature, the *Abood* Court extended the statutory analysis in *Street* by holding that dissenting employees cannot constitutionally be compelled to bear the cost of political expenditures unrelated to collective bargaining:

> We do not hold that a union cannot constitutionally spend funds for the expression of political

> views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.
>
> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. * * * We have no occasion in this case, however, to try to define such a dividing line. [*Abood*, 431 *U.S.* at 235-36, 97 *S.Ct.* at _____, 52 *L.Ed.*2d at 284-85.]

The Supreme Court's decision in *Ellis v. Railway Clerks* , _____ *U.S.* _____ , 102 *S.Ct.* 1883, 80 *L.Ed.*2d 428 (1984), clarified the distinction between permissible and impermissible union expenses for purposes of mandatory nonunion employee contributions. In *Ellis*, nonunion employees of Western Airlines did not contest the legality of the union-shop agreement, which required them to pay agency fees equal to the dues of union members, but rather objected to the inadequacy of the union's rebate procedure designed to refund that portion of fees attributable to political expenses. They also objected to the application of nonmember fees to six specific union expenses: a quadrennial convention; litigation not involving negotiation of agreements or settlement of grievances; union publications; social activities; death benefits for employees; and general organizing efforts.

The Court in *Ellis* struck down the rebate system on the ground that it constituted "an involuntary loan for purposes to which the employee objects." *Id.* at _____, _____ *S.Ct.* at _____, 80 *L.Ed.*2d at 439. The Court reasoned that such a result was impermissible because the union had available to it acceptable alternatives, such as granting nonmembers advance reduction of representation fees, or placing any challenged portion of such fees into interest-bearing escrow accounts. *Id.* at _____, _____ *S.Ct.* at _____, 50 *L.Ed.*2d at 439. With respect to the first-amendment challenge to the union's use of representation fees to finance the six activities, the Court concluded that nonunion employees should not have been charged for the litigation and organizational expenses of the union when they bore no significant relation to collective-bargaining activities. The Court upheld the assessments for conventions, social activities, and union publications (except for those portions devoted to political articles), noting that they were well within the range of union activities that related to the collective bargaining process. The Court declined to rule on the question of death benefits because the union was no longer the employees' exclusive bargaining agent and the employees were no longer covered by the death benefit system. *Id.* at _____, _____ *S.Ct.* at _____, 80 *L.Ed.*2d at 446-47.

Against this backdrop of federal court decisions, we consider the statute before us. First, we note that the New Jersey act expressly carves out from the realm of permissible expenditures those that are "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any

other benefits available only to members of the majority representative." *N.J.S.A.* 34:13A-5.5(c). This statutory exclusion correctly applies the principle recognized in *Abood* and *Ellis* that fees exacted from nonunion members of the bargaining unit cannot be used to support political or ideological expenditures not adequately related to collective bargaining or conditions of employment.

The statute does permit a union to finance from the nonmember representation fees those lobbying activities that are "designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." *N.J.S.A.* 34:13A-5.5(c). Kramer contends that this language is so imprecise that it would permit expenditures for broad categories of lobbying activities to which she is opposed, arguing that the requisite statutory connection between such lobbying and "goals in collective negotiations" or "advantages in * * * conditions of employment" is insufficiently delineated in the legislation to protect adequately her first-amendment rights. *See N.J.S.A.* 34:13A-5.5(c).

The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective-negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and reg-

ulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined by statute and a public employee union that ignored this reality would not represent properly the members and nonmembers in its bargaining unit. *See Abood, supra*, 431 *U.S.* at 227-32, 97 *S.Ct.* at _____, 52 *L.Ed.*2d at 279-81; C.W. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking," 44 *Cin. L. Rev.* 669 (1975). Respondent unions can readily identify a number of state statutes that directly affect conditions of employment for public schoolteachers and that would appear to be likely subjects for lobbying activity. *See, e.g., N.J.S.A.* 18A:66-1 to -192 (Teachers Pension and Annuity Fund); *N.J.S.A.* 18A:28-1 to -17 (tenure); *N.J.S.A.* 18A:6-30 and -30.1 (compensation for wrongful suspension or discharge); *N.J.S.A.* 18A:27-1 to -13 (hiring, contracts, evaluation of nontenured teachers, continuation and termination of employment, and authorization of school board rules governing employment of teachers); and *N.J.S.A.* 18A:30-1 to -8 (sick leave and work related disabilities).

There may, however, be occasions on which the leadership of a public-employee union commits organizational funds to lobby for or against causes only remotely related to collective negotiations or conditions of employment. Such lobbying is a permissible and accepted activity of labor organizations, consistent with the historical tradition of labor union involvement in social issues. *See, e.g., Abood, supra,* 431 *U.S.* at 235, 97 *S.Ct.* at _____, 52 *L.Ed.*2d at 284-85; *Street, supra,* 367 U.S.

at 800-18, 81 *S.Ct.* at _____ , 6 *L.Ed.*2d at 1179-89 (Frankfurter, J., dissenting).

The more removed the objectives of such lobbying are from collective negotiations or conditions of employment, the less likely it is that such lobbying activities can be financed by involuntary nonmember fees. As the United States Supreme Court noted in *Ellis* and *Abood*, any requirement that a nonunion member pay a fee to the union impinges upon that individual's first-amendment rights of free speech and association. That impact is constitutionally permitted only when the fee is used for objectives germane to collective negotiations or conditions of employment, because the collection of nonmember fees for these purposes promotes the governmental interest in achieving stability in labor relations. *See Ellis*, *supra*, _____ *U.S.* at _____ , _____ *S.Ct.* at _____ , 80 *L.Ed.*2d at 446-47; *Abood*, *supra*, 431 *U.S.* at 222-25, 97 *S.Ct.* at 1793, 52 *L.Ed.*2d at 276-78. When the nonunion member's fee is used to finance lobbying activities that have only a distant and tenuous link with negotiations or conditions of employment, it is unlikely that there will be a governmental interest sufficient to sustain the infringement upon first-amendment rights. Since the State interest invoked to sustain the Act is defined in terms of promoting stability in public employer-employee relations, the objective of a challenged lobbying activity must be measured against this State interest in order to determine if the relationship is sufficient to compel nonmembers to share in the cost of the activity. *See Ellis*, *supra*, _____ *U.S.* at _____ , _____ *S.Ct.* at _____ , 80 *L.Ed.*2d at 441-42 (expenditures must be sufficiently related to collective bargaining and be necessarily or reasonably incurred in

performing duties of exclusive representative to justify imposition on dissenters); *cf. Abood, supra*, 431 *U.S.* at 255, 259-64, 97 *S.Ct.* at _____ , _____ , 52 *L.Ed.*2d at 297, 300-303 (Powell, J., concurring) (For each union expenditure to be charged to nonmembers, the State must prove that such compulsory payment is necessary to serve paramount governmental interests.). In the context of this facial challenge to the Act, we do not now attempt to forecast the various objectives of lobbying activities that will or will not meet this standard.

Our obligation is to construe the statute in a manner that is not repugnant to first-amendment protections. Accordingly, we hold that the lobbying activities authorized by *N.J.S.A.* 34:13A-5.5 must be germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours, and other conditions of employment in order to invoke the State's interest in achieving stability in public-employee labor relations. *Cf. Robinson v. State of New Jersey*, 741 *F.*2d 598 (3d Cir. 1984), rev'g 565 *F.Supp.* 942 (D.N.J. 1983), *cert.* denied, _____ *U.S.* _____ , 105 *S.Ct.* 1228, 84 *L.Ed.*2d 366 (1985).[3] That State interest will require that

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[3] In *Robinson*, the Third Circuit considered the same constitutional challenges to the subject statute, *L.*1979, *c.*477, as are asserted here. Reversing the district court's determination that the use of nonmember representation fees for lobbying activities by public-employee unions violated the first amendment, the court observed:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be

lobbying activities that are supported by nonmember representation fees be relevant to the occupational interests of the employees in the bargaining unit so as to avoid impermissible infringement on first-amendment rights. As construed, we hold that the statute is not facially invalid since it furthers the State's significant interest in public-employment stability without encroaching impermissibly on the rights of free speech and association that are protected by the first amendment to the United States Constitution and by Article I of the Constitution of the State of New Jersey.

V

Appellant also challenges the demand-and-return system mandated by the statute, contending that it permits the union to use her representation fee for unauthorized purposes and imposes on her the onerous burden of seeking a refund of that portion of the fee expended for impermissible purposes. Taken literally, the statutory language could be read to allow a public-employee union annually to expend nonmember representation fees for political lobbying activities not permitted by the statute and thereafter to refund the portion of the fee improperly expended upon demand by an objecting nonmember. *N.J.S.A.* 13A-5.5(c) and -5.6. Implementation of the

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financed with representation fees. [741 *F.*2d at 609.]

The Third Circuit's two-pronged test of constitutionality—"pertinent to the duties of the union as a bargaining representative and * * * not used to advance the political and ideological positions of the union"—imposes a standard for assessment of lobbying activities that is similar to but not identical with the standard we adopt. The *Robinson* court also sustained, in a split decision, the facial validity of the statutory demand-and-return system. 741 *F.*2d 611-12.

statute in this manner not only would be impractical and unreasonable, but would also ignore the Supreme Court's warnings in *Abood*, a case cited by the Sponsors' Statement accompanying the statute, and the holding in *Ellis*.

In his concurrence in *Abood*, Justice Stevens observed that

> the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Any final decision on the appropriate remedy must await the full development of the facts at trial. [431 *U.S.* at 244, 97 *S.Ct.* at _____, 52 *L.Ed.*2d at 290.]

In *Ellis*, the Court struck down a rebate system that allowed the union to expend agency-shop fees for political purposes and only later offer pro rata refunds to those employees who demanded it:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an

> involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation. [_____ *U.S.* at _____, _____ *S.Ct.* at _____, 80 *L.Ed.*2d at 439.]

As noted above, the demand-and-return system in evidence before PERC was repealed before oral argument, and the replacement system is not in the record before us.[4] In view of this deficiency in the record, we consider appellant's challenge to be limited to the facial validity of the statutory provisions requiring the adoption of a demand-and-return system.

We note at the outset that the statute imposes a ceiling on nonmember representation fees by limiting them to 85% of regular membership fees, dues, and assessments. *N.J.S.A.* 34:13A-5.5(b). This ceiling clearly reflects the legislative intention to minimize the likelihood that nonmember fees will be used for purposes proscribed by the statute. This clear legislative purpose cannot be reconciled with the interpretation of the statute urged by appellant, *i.e.* that subjecting impermissible political

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[4] Its general terms and conditions, however, were discussed in *Robinson v. State of New Jersey, supra*, 741 *F.*2d 598, 610-14.

lobbying expenses to rebate through the demand-and-return system necessarily reflects a legislative acquiescence in including such expenses in the annual representation fee charged to nonmembers. We reject that interpretation, and hold that the provision requiring unions to refund fees used for impermissible political purposes was intended to describe a specific category of expenditures that could not constitutionally be financed by nonmember fees. It was not designed to authorize the intentional collection of such fees from nonmembers on the theory that the money would later be recoverable through the rebate process.

In our view, the legislative intent requires that the annual representation fee charged to nonmembers be calculated in a manner designed to avoid the use of nonmembers' money for unauthorized purposes. As noted in *Ellis*, no employee may be forced to grant an involuntary loan for purposes to which he objects. *Ellis*, *supra*, ____ *U.S.* at ____, 104 *S.Ct.* at 1890, 80 *L.Ed.*2d at 438-39. A pure rebate system, under which the union would have total discretion as to the use of nonmember funds until the refund is made, cannot adequately protect the dissenting employee. *Id.*; *Robinson*, *supra*, 741 *F.*2d at 612. Accordingly, we construe the statutorily mandated demand-and-return system to require that the majority representative compute the annual representation fee charged to nonmembers on the basis of the union's actual expenditures during the prior year. In calculating the fee, the majority representative must take into account the ratio that prohibited expenditures bore to total union expenditures in its previous year's budget. This will require the computation of the current year's

representation fee for nonmembers to exclude that percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to nonmembers.[5]

Adjustment of the nonmember representation fee to reflect the allocation between permissible and impermissible expenditures in the prior year's budget reduces but does not eliminate the possibility that nonmember fees may be put to improper uses. New expenditures or a different allocation of resources in the majority representative's current budget could create the risk that nonmember fees may be improperly expended and then recouped only by refund through the demand-and-return system, a practice condemned by *Ellis, supra*, ____ *U.S.* ____, 102 *S.Ct.* 1883, 80 *L.Ed.*2d 428. Refinements of the statutory demand-and-return system can undoubtedly be devised to reduce even further the risk of unconstitutional uses of nonmember fees. *Ellis* suggests the adoption of interest-bearing escrow accounts as a means of preventing the actual use of nonmember funds during the pendency of challenges to proposed expenditures. There are surely other means by which a majority representative can enhance its demand-and-return system to achieve the constitutionally mandated objective. Since the issue here is the facial validity of the statute, we do not anticipate the various circumstances in which challenges to demand-and-return systems could be asserted nor need

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[5] Accordingly, the maximum nonmember representation fee for the current year would be an amount equal to membership dues reduced by the percentage of impermissible expenditures in the prior year's budget. In no event may the nonmember fee exceed 85% of the dues charged to members. *N.J.S.A.* 34:13A-5.5(b).

we decide in advance what refinements may be required to counter such challenges.

The demand-and-return system itself, beyond the statutory requirement that the burden of proof be on the majority representative, must provide an uncomplicated, efficient, and readily accessible process for contesting the representation fee. Such a process must contain no features or conditions that would in any manner inhibit or restrain a nonmember employee from utilizing it. Obviously, the systems actually adopted by majority representatives will vary in their details, but any challenges to such systems must be measured by the standards imposed by the statute as construed here.

Thus, we hold that the demand-and-return system mandated by *N.J.S.A.* 34:13A-5.6 is not unconstitutional on its face. Supplemented by the procedural safeguards that we have determined are required to achieve the legislative purpose of the Act, the validity of specific demand-and-return systems will depend upon the extent to which they accord this protection to the nonmember employees for whose benefit they must be established.

Accordingly, for the reasons expressed, the judgment of the Public Employment Relations Commission is modified, and, as modified, is affirmed.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, O'Hern and Garibaldi join in this opinion.

APPENDIX A-2

Decision and Order
of the State of New Jersey
Public Employment Relations Commission
in *In re Boonton Board of Education,*
July 18, 1983

P.E.R.C. No. 84-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

IN THE MATTER OF BOARD
OF EDUCATION OF THE TOWN
OF BOONTON,

Respondent,

and

Docket No.
CI-82-21-123

JUDITH M. KRAMER,

Charging Party.

BOONTON EDUCATION ASSOCIATION
AND NEW JERSEY EDUCATION
ASSOCIATION,

Respondents,

and

Docket No.
CI-82-22-124

JUDITH M. KRAMER,

Charging Party.

DECISION AND ORDER

On November 30, 1981, Judith M. Kramer, a teacher, filed an unfair practice charge against the Board of Education of the Town of Boonton ("Boonton"),[1] her employer, and an unfair practice charge against the

[1] The charge was initially filed against the Boonton Public Schools, but the caption was later amended to reflect the Board's position as Kramer's employer.

Boonton Education Association ("Association"), her majority representative, and the New Jersey Education Association ("NJEA"), an Association affiliate, with the Public Employment Relations Commission. Both charges challenged the legality and implementation of an agreement between the Board and the Association to deduct a representation fee from the paychecks of non-members of the Association such as Kramer.

The first charge specifically alleged that the Board violated subsections 5.4(a)(1) and (3)[2] of the New Jersey Employer-Employee Relations Act ("Act"), *N.J.S.A.* 34:13A-1 *et seq.*, and *N.J.S.A.* 52:14-15.9(e),[3] when, on or about October 15, 1981, it put into effect an automatic dues checkoff provision without first securing her authorization or insuring that the Association had a demand and return system in place.[4]

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[2] These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

[3] This subsection provides, in part: "Whenever any person holding employment, whose compensation is paid by . . . (any) board of education . . . in this State . . . shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.

[4] Kramer also attached a statement to this charge in which she asserted that she informed the superintendent on October 14, 1981 by letter that

The second charge specifically alleged that the Association and the NJEA violated subsection 5.4(b)(1)[5] of the Act and *N.J.S.A.* 52:14-15.9(e) when, since on or about October 15, 1981, they: (1) refused to tell or allow Kramer to see the provision of the collective negotiations agreement concerning representation fees, thus making it impossible to determine whether the Association had breached its duty of fair representation; (2) demanded, in a letter dated October 7, 1981, that she join the Association; (3) established an automatic dues checkoff procedure without first establishing a demand and return system or securing signed authorization cards; (4) refused to give advance information on the amount due; (5) refused to display a demand and return system until after the forced checkoff was in effect; and (6) established a non-uniform representation fee system which charges lower amounts to certain members than it does to certain non-members.[6]

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she objected to the deduction of a representation fee. A copy of that letter was also attached. There, she also asserted that the Association had refused to show her the contract provisions concerning representation fees, its demand and return system, and a written statement of how her representation fee would be used and how it was derived.

[5] This subsection prohibits public employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

[6] Kramer also attached a statement to this charge in which she asserted that the Association's membership chairman told her that only members could elect a lump sum payment; an Association bargaining committee member told her she would get a copy of the contract in about three weeks; the Association's president told her that she could hire a lawyer if she did not want to join the Association as a full member or through payroll deductions; another Association bargaining committee member told her the demand and return system would be posted after the dues checkoff began and she could see the contract when it was typed; and

On February 9, 1982, Kramer amended her charge against the Association and NJEA to add several allegations. The amendment asserted that the Association and NJEA violated the guarantees of freedom of speech and association contained in the United States and New Jersey Constitutions, as well as subsection 5.4(b)(1) of the Act, when they sought to enforce a representation fee system which allegedly was not limited to activities related to negotiations and contract administration, but allegedly extended to various partisan political, lobbying, and social activities.

On May 17, 1982, the Director of Unfair Practices issued an Order Consolidating Cases and a Complaint and Notice of Hearing pursuant to *N.J.A.C.* 19:14-2.1. The Board, the Association, and the NJEA filed Answers denying all the Complaint's allegations except that the Board and Association had negotiated a provision permitting the deduction of a representation fee from the paychecks of non-members. The Board also alleged that it was the responsibility of the Association to establish and maintain a demand and return system pursuant to

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an NJEA representative told her that non-members had to pay representation fees by checkoff and that he did not have to talk to her. Also mentioned was an October 22, 1981 letter from the Association which allegedly made it clear that all persons in the Association's unit were not paying dues on a uniform basis. Attached to this statement was an October 7, 1981 letter from the Association's president and chairperson giving Kramer the choices of joining the Association as (1) a cash member with full payment of dues by October 15, and (2) an automatic payroll deduction member with dues to be deducted in monthly installments. Finally, Kramer attached a letter dated October 15, 1981 to Kramer from the Association's president and membership chairperson informing her that they would forward her name as a non-member to the Board so that the Board would begin representation fee deductions.

N.J.S.A. 34:13A-5.5. The Association and NJEA also alleged that the Association had adopted a demand and return system and that representation fees had been deducted and paid over to the Association in accordance with *N.J.S.A.* 34:13A-5.5 *et seq.*

On September 13, 1982, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. At the outset, he quashed a subpoena duces tecum which would have required the Association and NJEA to produce all documents pertaining to the operation of the demand and return system, calculation of the representation fee, computation of the refundable amount, and claimed costs of collective negotiations, contract administration, and grievance processing for members of the Association's unit from July 1980 to July 1982. He ruled that the Appeal Board established pursuant to *N.J.S.A.* 34:13A-5.6 had jurisdiction over challenges to the amount of representation fees and that the subpoenaed documents were not relevant to an unfair practice proceeding before the Commission as opposed to a representation fee appeal proceeding before the Appeal Board.[7] The parties then examined witnesses and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On March 25, 1983, the Hearing Examiner issued his report and recommendations. H.E. No. 83-33, 9 *NJPER* 248 (¶14114 1983). He found that the Board, the Association, and the NJEA violated the Act when a repre-

[7] On September 29, 1982, Kramer filed a Motion for Leave to Appeal the Hearing Examiner's decision to quash the subpoena duces tecum with the Appellate Division of the Superior Court. Kramer did not ask the Commission to review this decision first. On October 21, 1982, the Court denied Kramer's motion.

sentation fee was deducted for the month of September, 1981 although the Association's demand and return system was not in place until October. As a remedy, he recommended that the defendants be ordered to refund the sum of $18.54 plus 12% interest per annum to Kramer and to post a notice of their violations and remedial actions. He recommended that the Commission dismiss all other aspects of the Complaint. In particular, he found that Kramer had failed to prove she was not able to see a copy of the demand and return system; that *N.J.S.A.* 52:14-15.9(e) did not give her a right to resist automatic dues deduction of a representation fee; that the October 7, 1981 Association letter offering Kramer two choices of membership was not coercive; that the Association's two-tiered dues structure for professional and non-professional employees did not discriminate against non-members and was in any event not challenged in Kramer's pleadings; that the Commission did not have jurisdiction to consider Kramer's argument that part of her representation fee was spent for impermissible purposes; and that the Commission could not rule the representation fee statute unconstitutional, but instead had to accept the validity of the statute.

On April 4, 1983, the Association and NJEA filed Exceptions. They except to the Hearing Examiner's conclusion that it was illegal to retroactively deduct a representation fee for September, 1981 since the demand and return system was not established until September 30, 1981. They assert instead that the retroactive deductions, commencing in February, 1982, were proper since they were made after the demand and return system was in place.

On April 7, 1983, Kramer filed Exceptions. She contends the Hearing Examiner erred in: (1) not describing the charge and amended charge against the Association and the NJEA more fully;[8] (2) failing to consider the "uncontroverted fact" that failure to provide Kramer a copy of the contract made it impossible to determine if the Association had breached its duty of fair representation in other ways besides (allegedly) negotiating an unlawful representation fee provision and administering that provision in a discriminatory and arbitrary manner; (3) quashing the subpoena duces tecum, ruling the Commission lacked jurisdiction over Kramer's challenges to the use of her representation fee, stating that Kramer had not made constitutionally-based arguments at the hearing, refusing to recognize that the Appeal Board was allegedly not fully constituted, and refusing to declare the statute unconstitutional; (4) finding (no. 7) that Kramer knew before and after the October 7, 1981 letter that she did not have to join the Association and failing to appreciate the allegedly coercive nature of that letter; (5) finding (no. 5) that the Association adopted a demand and return system on September 30, 1981 and that therefore deductions for the month of October, 1981 and for subsequent months were proper, despite alleged constitutional defects in the demand and return system and the Appeal Board; (6) finding (no. 11) that the president of the Association was Marilyn Ward, not Tom Adams,[9] and that the posting of the demand and return system on certain bulletin boards was sufficient to

[8] Our description of the charge is more detailed.

[9] Kramer is correct. Adams was president at the time of the relevant events, though Ward was president at the time of the hearing.

inform Kramer how and whether to apply for a refund; (7) finding (no. 16) that "all" members of the Association must also join the NJEA and the National Education Association ("NEA")[10] and refusing to determine that the two-tiered dues structure violates the Act; (8) requiring Kramer to prove that she was not able to see a copy of the demand and return system rather than requiring the Association to prove it did provide actual notice; and (9) limiting Kramer's claim of disparate treatment in dues deduction to an alleged violation of *N.J.S.A.* 52:14-15.9(e).

On April 7, 1981, the Board notified the Commission that it accepted the Hearing Examiner's report and would follow his recommendations including posting a notice. It also stated that the Association, not the Board, should pay the money owed Kramer since the Association had already received her representation fee for September 1981.

Kramer requested oral argument. On April 25, 1983, the Chairman of the Commission granted this request and scheduled oral argument for the next Commission meeting on June 1. Kramer subsequently withdrew this request.

We have reviewed the record. We set forth the following facts as the background for our discussion of the legal issues.

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[10] In fact, supportive staff members of the Association must also join the Association and the NJEA, but need not join the Morris County Education Association ("MCEA") or the NEA. Professional employees who are members of the Association must also join all three of the Association's affiliates. See *infra* at pp. 10-11.

The Association is the majority representative of certain Board employees including teachers, custodians, bus drivers, and cafeteria workers. The Association and the Board have entered a collective negotiations agreement effective between July 1, 1981 and June 30, 1983. Article XV, entitled Agency Shop, provides:

A. Representation Fee

If a member of the bargaining unit (See Article IB) does not become a member of the Association during any membership year (i.e., from September 1 to the following August 31) which is covered in whole or in part by this Agreement, said employee shall be required to pay a representation fee in lieu of dues not to exceed eighty-five (85) percent of regular union dues, fees and assessments to the Association for that membership year. It is expressly understood that this Article becomes effective on July 1, 1981, and applies prospectively only.

B. Procedure

1. Notification: Prior to November 1 each year, the Association will submit to the Board a list of those employees who have neither become members of the Association for the then current membership year [nor] paid directly to the Association the full amount of the representation fee for that membership year. The Board will deduct from the salaries of such employees, in accordance with Paragraph 2 below, the full amount of the representation fee and promptly will transmit the amount so deducted to the Association.

2. Payroll Deduction Schedule: The Board will

deduct the representation fee in equal installments, as nearly as possible, from the paychecks paid to each employee on the aforesaid list during the remainder of the membership year in question. The deductions will begin with the first paycheck paid:

a. 10 days after receipt of the aforesaid list by the Board; or

b. 30 days after the employee begins his or her employment in a bargaining unit position.

3. Termination: If an employee who is required to pay a representation fee terminates his/her employment with the Board before the Association has received the full amount of the representation fee to which it is entitled under this Article, the Board will deduct the unpaid portion of the fee from the last paycheck to said employee during the membership year in question. The procedure, as described in B.3. above, shall apply only if it is equally applied under the same circumstances to members of the Association for the purposes of dues collection.

4. Mechanics of Deduction and Transmission of Fees: Except as otherwise provided in this Article, the mechanics for the deduction of representation fees and the transmission of such fees to the Association will, as nearly as possible, be the same as those used for the deduction and transmission of regular membership dues to the Association.

5. Notification: The Association will notify the Board in writing of any changes in the list provided for in Paragraph 1 above. The Association will further notify the Board of the amount of the repre-

sentation fee before July 1.

C. Indemnification

> The Association shall indemnify and hold the employer harmless against any and all claims, demands, suits, and other forms of liability, including liability for reasonable counsel fees and other legal costs and expenses, that may arise out of, or by reason of any action taken or not taken by the employer in conformance with the provision.

The Board ratified this agreement on June 22, 1981. After the agreement had been typed and xeroxed, copies of it were distributed to all employees of the Board. Kramer found a copy on her desk on December 3, 1981.

All Association members have the same privileges to vote and run for office. Members who are professional employees must also join and pay dues to the NEA, NJEA, and MCEA. Members who are supportive staff employees (for example, custodians, secretaries, aides, bus drivers, and cafeteria workers) must also join and pay dues to the NJEA, but not the NEA and the MCEA.

Supportive staff members pay lower NJEA dues than professional employees because their average earnings are lower and the NJEA believes it is equitable to adjust their dues accordingly. Aides, bus drivers, and cafeteria workers, a subcategory of the supportive staff employees, pay about one-third the local (Association) dues that teachers, custodians, and clerical employees pay because their average earnings are about one-third the average earnings of teachers and other supportive staff members,

and the Association believes it is equitable to adjust their dues accordingly. Membership dues are either paid to the Association directly in cash or are deducted from paychecks after the Board receives an automatic payroll deduction form from the member and verification of the deduction from the Association.

On or about September 22, 1981, the Association posted a Notice of Rebate Procedure. This document stated:

> Pursuant to the agreement negotiated with the Boonton Board of Education, the Boonton Education Association, as the majority representative, is assessing a representation fee against all non-members for the 1981-82 school year in the amount of $190.40 for active professional and $81.60 for active supportive, which is 85% of regular membership dues.
>
> The amount of monies preliminarily determined to be expended for member only benefits and partisan political or ideological activities financed by regular association dues is $0 per member. The amount of preliminary rebate is $0.
>
> As a non-member subject to the representation fee, you may request a rebate of monies over and above 15% of the association's expenditures on member only benefits and/or partisan political or ideological activities.
>
> —In order to request a rebate a non-member must send a written request for the rebate to the Boonton Education Association by November 30, 1981. The request should include the following:

1) statement of non-member status;
2) non-member's name and address;
3) employment position;
4) request for rebate for additional expenditures for political activitiy and/or member only benefits.

It was posted on faculty lounge bulletin boards as well as on other bulletin boards in the main offices, cafeterias, and maintenance buildings. Kramer saw a copy of this document on the high school's main office bulletin board. The Association also forwarded a copy of the document to the Board with a notation that it had been posted in all schools, maintenance buildings, and Board offices.

On September 30, 1981, the Association had a meeting. The president of the negotiating team, Marilyn Ward, moved that the Association adopt a "Local Association Demand and Return System" in order to comply with *N.J.S.A.* 34:13A-5.5 *et seq.* and to permit non-members to challegne the representation fee. She also moved that the procedure be placed in the minutes and posted in all school buildings. These motions carried.

The Association's demand and return system provides for the following steps. Within 30 days after the beginning of each fiscal year in which a representation fee agreement will be in effect, the Association must determine whether a non-member will be entitled to a preliminary rebate of a portion of his representation fee. Based on the combined budgets of the Association and its affiliates for the coming year, the Association must grant a preliminary rebate of the amount, if any, by

which expenditures for member-only benefits and political activity[11] exceed the difference between regular membership dues for a particular category of membership (here professional employees) and the 85% representation fee. The Association must then post a notice indicating whether there will be a preliminary rebate,[12] the amount of any such rebate, and the steps a non-member must take in order to request a rebate. The non-member may then file a written request for a rebate with the Association. Within 30 days after the end of the fiscal year, the Association must send to each non-member who requested a rebate a written communication indicating whether there will be a final rebate. The final rebate is calculated in the same manner as the preliminary rebate, but is based on an audit of the expenses actually incurred during that fiscal year. The notice of final rebate must contain a check for any final rebate, state the reasons for any difference between the preliminary and final rebates,

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[11] Political activity is defined as follows:

1. the support of a candidate for public office, a political party, or a political action committee;
2. the determination or publicizing of an organizational preference for a candidate for public office or a political party;
3. efforts to enact, defeat, repeal or amend legislation which is only incidentally related to the terms and conditions of employment of the employees represented by this Association as the majority representative but does not mean lobbying activities designated to foster policy goals in collective negotiations and contract administration or to secure for the employees represented by the Association advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the board of education; and
4. contributions to charitable, religious or ideological causes only incidentally related to the terms and conditions of employment of the employees represented by the Association.

[12] The September 22, 1981 notice anticipated this requirement. The notice stated there would be no preliminary rebate.

and list the steps for a challenge to the absence or amount of a final rebate. The steps for challenging a final rebate are: (1) notifying the Association in writing of the challenge, (2) informal attempts to dispose of the challenge, (3) proceedings before a Regional Review Panel consisting of one representative each from the Association, the MCEA, the NJEA, and the NEA; the Association must carry the burden of demonstrating before this panel that no part of the unrebated representation fee was used for political activity or member-only benefits, and the non-member may submit written material and argue orally to the panel; and (4) an appeal to the three member Appeal Board established by *N.J.S.A.* 34:13A-5.6

On or about October 1, 1981, the Association posted copies of the demand and return system in the same places as the rebate procedure notice and informed the Board of its adoption. Kramer testified that she did not see a copy of the demand and return system, and the Association and the Board did not give her one personally. She scans the bulletin board in the main office of the high school, where she saw the rebate procedure notice. She does not read bulletin boards set aside for faculty because she objects to some of the material placed on them. The faculty bulletin boards are divided into sections; one section, for example, might contain Association materials while another section might contain general personnel information.

On or about October 7, 1981, the Association's president and membership chairperson sent Kramer a letter inviting her to join the Association and informing her

that the Association had negotiated a fair share representation fee, totalling 85% of Association dues, to be deducted from the paychecks of all unit members who did not join the Association by October 15. The letter concluded:

> We offer you the following choices:
>
> 1. that you join as a cash member with payment in full of the dues by October 15.
>
> 2. that you join as an automatic payroll deduction member with dues to be deducted in monthly installments.

Annoyed by this letter, Kramer spoke with the Association's president and told him she did not like being offered only two choices. He responded that she had a third choice—hiring a lawyer. She replied she had a fourth choice—not joining. He agreed.

At the president's suggestion, Kramer then spoke with the Association's membership chairman. Kramer asked how much the fee would be; the chairman responded that the fee would be 85% of a teacher's membership dues or about $190. The chairman said she would not give Kramer a written statement to that effect. Kramer asked to see the contractual authorization for the representation fee; the chairman responded that the contract was being typed. The chairman referred Kramer to a member of the negotiating team who could tell her the contractual language.

The negotiating team member told Kramer that al-

though he could not quote the pertinent contractual language, it essentially incorporated the standards set forth in the representation fee statute. He offered to obtain a copy of the statute for Kramer; she declined and later obtained her own copy. He also offered to give Kramer a copy of the previous year's financial statements for the Association; she accepted.

Kramer then asked the chairman of the negotiating team about her representation fee and the demand and return system. According to Kramer, the chairman said the demand and return system would be posted by October 20[13] and referred her to an NJEA field representative for assistance with "technical" questions concerning the content of the demand and return system, the automatic aspect of the deduction, and the exact language of the contract.

Kramer then called the NJEA representative. He told Kramer he was only talking to her as a favor to the president of the negotiating team and that he did not have to talk to a non-member. He encouraged her to join and said she had to decide by October 15. He also told her the Association had to file its demand and return system by October 20, she had to ask for any money back by December 1, and the Association had until September of the following year to send back any rebate. The representative also broke down where a teacher's membership dues went among the four organizations: (1) $48 to

[13] We credit the testimony of the chairman of the negotiations team that the demand and return system was posted on or about October 1, 1981, and do not believe Kramer's recollection is accurate with respect to this particular statement.

NEA, (2) $15 to NJEA, (3) $21 to MCEA, and (4) the rest to the Association.[14] When Kramer asked her if she could pay a representation fee directly, without an automatic dues checkoff, he said no because the NJEA and NEA had to have their money as a lump sum and could not be sure Kramer would pay it otherwise. He also said that only members could make advance lump sum payments.

On or about October 14, 1981, Kramer wrote a letter to the superintendent informing her that she did not authorize payment of a representation fee. The letter asserted that Kramer had not been allowed to see either the Association's demand and return system or the contractual provision authorizing a demand and return system. It also asserted that an automatic dues checkoff would violate *N.J.S.A.* 52:14-15.9(e).

On or about November 9, 1981, Kramer sent the Association's president a letter asserting her claim under the demand and return system for any amount which the Association was not entitled to receive under *N.J.S.A.* 34:13A-5.6. On November 24, 1981, the president, in writing, acknowledged receipt of this letter and informed Kramer that there would be no preliminary rebate and that the final rebate would be computed after the close of the fiscal year, with any rebate forwarded to her by September 30, 1982.

On January 28, 1982, the Board's Business Administrator and Secretary wrote to Kramer that effective with

[14] Kramer was not sure of the accuracy of her recollection of these numbers.

the February payroll, a representation fee would be automatically deducted from her paycheck. The fee would equal $19.04 a month, a figure based on an automatic payroll deduction representation fee report which the Association supplied the Board. The fee would be assessed retroactively to the start of the school year; thus, the February through June deductions would be doubled so as to cover the September through January deductions. Before writing this letter, the Business Administrator/Secretary satisfied himself, through communications with Association representatives in late September 1981, that the Association had established a demand and return system and had notified employees of its existence. Kramer testified that the Board never pushed her to become an Association member.

The deductions commenced February 1, 1982. Each doubled monthly deduction for the rest of the 1981-82 school year was for $38.08.[15] Kramer never consented to the deductions. Because of the higher dues charged teachers, Kramer's 85% representation fee exceeds the membership dues charged certain employees such as bus drivers or aides. At the time of the hearing, the Association was in the process of auditing its books for the 1981-82 school year and determining whether there would be any final rebate.

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[15] The Business Administrator and Secretary testified that each deduction was for $37.08. He based his testimony, however, on his recollection of the amount set forth in the Association's automatic payroll deduction representation fee report. The figure in that report was, in fact, $38.08. We accept the report's figure as the accurate one. Thus, we find that Kramer's representation fee payment for September, 1981 was $19.04, not $18.54 as the Hearing Examiner found.

Our first and major task in this litigation is to determine what issues are properly before us, what issues should properly be raised before the Appeal Board, and what issues should properly be raised before the courts. A brief review of the history of agency shop in New Jersey, the present statutory framework governing representation fee deductions, and the status of current court litigation challenging this framework will assist in this task.

Prior to July 1, 1980, there was no specific statutory authorization in New Jersey for the collection of agency shop or representation fees from non-members of the majority representative.[16] In *New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Auth.*, 64 *N.J.* 579 (1974), affirming 123 *N.J. Super.* 461 (App. Div. 1973) ("*Turnpike Authority*"), the New Jersey Supreme Court held that a contractual clause providing for the mandatory payment of such fees violated the New Jersey Employer-Employee Relations Act in the absence of specific legislative authorization for such clauses. The Court specifically held that contractual clauses requiring agency shop payments violated the rights of non-members under section 5.3[17] to refrain from assisting any employee organization. Thus, before July 1, 1980, it was clear under the *Turnpike Authority* case that

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[16] We use the terms agency shop and representation fees here in a generic and interchangeable sense to mean fees paid to a majority representative by unit employees who are not and need not become members of the majority representative, but who are entitled to be represented fairly by the majority representative in employment matters.

[17] This subsection provides, in part: "Public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity."

employers and unions agreeing to agency shop clauses violated section 5.3.[18]

In 1977, the United States Supreme Court, in *Abood v. Detroit Bd. of Ed.*, 431 *U.S.* 209, 95 *LRRM* 2411 (1977) ("*Abood*"), upheld the federal constitutionality of a Michigan statute authorizing public employers and majority representatives to negotiate agency shop arrangements whereby every employee represented by a union, even though not a union member, must pay to the union a service fee equal in amount to union dues; failure to make such payments could lead to discharge. The Supreme Court also held, however, that a majority representative could not constitutionally expend a nonmember's agency shop fees over his objection for political or ideological purposes unrelated to collective negotiations, contract administration, or grievance adjustment.

Because an evidentiary record had not been developed, the Supreme Court remanded the case to the Michigan state courts for consideration of the difficult and hazy problems of determining whether particular expenditures are related or unrelated to collective negotiations, contract administration, or grievance adjustment. The Supreme Court also suggested that further Michigan state court proceedings might be deferred pending the parties' voluntary recourse to an internal demand and return system developed by the majority representative.

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[18] After the amendments to the Act which conferred unfair practice jurisdiction on this Commission effective January 20, 1975, but before July 1, 1980, it was clear as well that agency shop clauses violated subsections 5.4(a)(1) and (b)(1) which prohibit interference with the nonmembers' rights under section 5.3 to refrain from supporting any employee organizations.

That system allowed the employee to demand and receive from the majority representative any portion of his agency shop fee spent for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment;" an impartial board was empowered to review the majority representative's calculations.[19]

Thus, as of 1977, it was clear under *Abood* that state statutes authorizing public employers and majority representatives to negotiate representation fees for services rendered in connection with contract negotiations, contract administration, or grievance processing could be constitutional. Nevertheless, agreements requiring the payment of representation fees were still illegal in New Jersey because of the proscription of section 5.3 of the Act, the *Turnpike Authority* case, and the absence of any affirmative statutory authorization.

In February, 1978, a bill authorizing negotiation over payment of representation fees for services rendered was introduced in the New Jersey Legislature (Assembly Bill No. 688). An accompanying sponsor's statement relied upon *Abood*. This bill, as originally drafted, would have given the Public Employment Relations Commission exclusive power to hear and decide all issues arising in a challenge to any representation fee. The bill was then, however, revised to substitute for the Commission recourse to a union's internal demand and return system, culminating in an appeal to a three member tripartite

[19] The Supreme Court reserved judgment on the constitutional sufficiency of the demand and return system involved in that case.

board, for challenges to the amount of representation fee refunds. An accompanying sponsor's statement relied upon *Abood*'s suggestion of using an internal demand and return system, with an appeal to an impartial board, to determine whether any portion of the representation fees had been spent for political or ideological purposes not incidentally related to the terms and conditions of employment.

On February 27, 1980, Assembly Bill No. 688, with the revision described and various others, was enacted into law. It took effect on July 1, 1980 and is now codified as *N.J.S.A.* 34:13A-5. through 5.9. This statute supplies the authority for representation fee deductions which the *Turnpike Authority* case found lacking.

N.J.S.A. 34:13A-5.5 requires a public employer to negotiate, upon demand, with a majority representative concerning the subject of requiring the payment by all non-member employees in the negotiations unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Any agreements reached must be in writing.

N.J.S.A. 34:13A-5.5(b) makes the amount of representation fee equivalent to the regular membership dues, initiation fees, and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees, and assessments and available to or benefitting only members. In no event may the fee exceed 85% of the regular dues, fees, and

assessments.[20]

N.J.S.A. 34:13A-5.5(c) confers a right upon representation fee payers to demand and receive from the majority representative, under proceedings established and maintained pursuant to *N.J.S.A.* 34:13A-5.6, a return of any portion of their fees which were spent either: (1) "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment" or (2) applied toward the cost of member-only benefits. The representation fee payers may not, however, recover any portion of their fees spent in support of lobbying activities: (1) ". . . designed to foster policy goals in collective negotiations and contract administration. . ." or (2) "to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer."

N.J.S.A. 34:13A-5.6 sets forth the mechanism for payment of representation fees, the conditions which must accompany payment of such fees, and the necessary components of a demand and return system to be used in representation fee challenges pursuant to *N.J.S.A.* 34:13A-5.5(c). Representation fees are paid by payroll deduction from the wages or salaries of the non-member employees. Two conditions must exist if deductions are to be allowed pursuant to a written contractual clause

[20] The Commission has held that while a public employer is not required to agree to a representation fee provision, if it does so, it cannot insist to the point of impasse upon negotiating the amount of the representation fee. *In re Township of Hamilton*, P.E.R.C. No. 82-121, 8 *NJPER* 370 (¶13169 1982); *In re Woodbridge Township Bd. of Ed.*, P.E.R.C. No. 81-131, 7 *NJPER* 330 (¶12147 1981).

authorizing representation fee payments: (1) "membership in the majority representative [must be] available to all employees in the unit on an equal basis"[21] and (2) "the representation fee in lieu of dues shall be available only to a majority representative which has established and maintained a demand and return system which provides pro rata returns as described in [*N.J.S.A.* 34:13A-5.5]." A majority representative's demand and return system must include a provision ". . .by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through fair and full proceedings placing the burden of proof on the majority representative." These proceedings, in turn, must provide for an appeal to a three member board, appointed by the Governor and confirmed by the Senate. The board is composed of a strictly impartial chairman, a public employer representative, and a public employee organization representative.[22]

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[21] The Commission interpreted this proviso in *In re City of Jersey City*, P.E.R.C. No. 83-32, 8 *NJPER* 563 (¶13260 1982), appeal pending App. Div. Docket No. A-768-82T1 ("*Jersey City* [*sic*]), and concluded that a majority representative violated subsections 5.4(b)(1) and 5.6 of the Act when it collected representation fees from CETA supervisors who were disqualified, because of their temporary Civil Service status, from running for Association office.

[22] The Appeal Board, formally known as the Public Employment Relations Commission Appeal Board although it is a separate entity from the Commission, had all three members appointed and confirmed and was thus fully established as of January, 1982. *Olsen v. New Jersey*, Chan. Div. Docket No. C-4286-818 (July 12, 1982), appeal pending App. Div. Docket No. A-5282-81T3. The Chairman, however, resigned in February 1982, and a successor Chairman was not confirmed until June, 1983. The public employer representative recently died and has not yet been replaced. We do not agree with Kramer's assertion that the Appeal Board does not exist.

The last sentence of *N.J.S.A.* 34:13A-5.6 provides that nothing in the representation fee statute shall be deemed to require any employee to become a member of the majority representative. *N.J.S.A.* 34:13A-5.7 then makes it an unfair practice under *N.J.S.A.* 34:13A-5.4(a)(1) or 5.4(b)(1), respectively, for either a public employer or a majority representative to ". . .discriminate between non-members who pay the said representation fee and members with regard to the payment of such fee other than as allowed under this act. . . ."[23]

Federal constitutional attacks upon the New Jersey representation fee statute are now underway in the federal district court of New Jersey. In three opinions concerning the propriety of preliminary injunctive relief[24] against the deduction, transmission, or expenditure of the named plaintiffs' representation fees by the named defendant employers and unions, Judge Dickinson R. Debevoise has ruled that there are two constitutional

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[23] *N.J.S.A.* 34:13A-5.8 concerns certain aspects of when the representation fees shall be paid and is not material to this proceeding. *N.J.S.A.* 34:13A-5.9 authorizes this Commission to promulgate rules or regulations to effectuate the purposes of the representation fee legislation. The Commission has today adopted rules authorizing the Appeal Board to use the offices, equipment, and personnel of the Division of Public Employment Relations to process matters before it and to otherwise perform its functions pursuant to *N.J.S.A.* 34:13A-5.6. In addition, the Office of Administrative Law has proposed rules concerning its hearings in contested cases before the Appeal Board.

[24] Preliminary injunctive relief means relief issued pending the final resolution of the proceedings. It requires a showing that the plaintiff is likely to succeed on the merits of his claim, the plaintiff will suffer irreparable harm during those proceedings unless preliminary relief is granted, and there will be no countervailing harm to other interested persons or to the public interest if a preliminary injunction is granted.

defects in the representation fee statute: (1) the legislative authorization of using representation fees, over an employee's objection, for two different categories of lobbying is unconstitutional because *Abood*, he believes, only allows the use of representation fees to lobby for the approval or implementation of a collective negotiations agreement, and (2) the statutory demand and return system is unconstitutional because, he believes, it does not provide a speedy and practical way to recover those portions of the fee authorized to be taken or spent for impermissible purposes. *Robinson v. New Jersey*, 547 *F.Supp.* 1297, 112 *LRRM* 2308 (D.N.J. 1982), appeal pending, Third Circuit Docket Nos. 82-5698, 83-5707, 82-5750; *Olsen v. CWA*, ____ *F Supp.* ____ , 112 *LRRM* 3182 (D.N.J. 1983), appeal pending, Third Circuit Docket Nos. 83-5403, 83-5459; *Robinson v. New Jersey*, ____ *F.Supp.* ____ , ____ *LRRM* ____ (D.N.J., June 15, 1983). After the first and second opinions, the Court preliminarily enjoined the named defendant unions from using any representation fees for lobbying purposes other than lobbying by the majority representative specifically to secure agency or legislative action required to implement the contract and preliminarily enjoined the state and national affiliates of the named local unions from using the representation fees of named plaintiffs for any purposes other than placing the fees in escrow.[25] After the third opinion, the Court preliminarily enjoined the named employer defendants from deducting and paying and the named union defendants from receiving representation fees on account of any

[25] After the first opinion, the named plaintiffs also sought to convert their suit into a class action. Judge Debevoise denied this request. Plaintiffs subsequently renewed their request which is still pending.

plaintiff who files written notice with his employer and his majority representative that he objects to payment of such fees. The injunction as to any plaintiff is to remain in effect until the plaintiff withdraws his objection or until the statute is amended (1) so as to exclude from representation fees expenses for political, ideological, and lobbying activities (other than lobbying to secure approval or implementation of a collective negotiations agreement) and (2) so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union.

Litigation over the federal constitutionality of the New Jersey representation fee statute is continuing in the New Jersey district court. Proceedings and decisions on plaintiffs' requests for final declaratory and injunctive relief and for damages still remain to be completed.[26] In addition, the district court's interim relief rulings in the first and second opinions with respect to the constitutionality of the lobbying provisions have already been appealed to the Third Circuit Court of Appeals and an appeal with respect to the ruling in the third opinion on the constitutionality of the demand and return system provisions is possible in the near future to the same body. Thus, while there are certainly serious constitutional questions about the New Jersey representation fee statute at this moment, these questions have not been completely or finally answered yet.

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[26] In particular, defendants have asserted that judicial surgery to effectuate the legislative intent to comply with *Abood* may be possible. See, *USA Chamber of Commerce v. State*, 89 *N.J.* 131, 151-154 (1982). For example, defendants have argued that it may be possible to excise one or both of the lobbying categories, if ultimately found objectionable, and to leave the rest of the statute intact.

This discussion of the history and nature of the representation fee statute and the ongoing federal court litigation shows that there are three bodies empowered to review various aspects of disputes concerning that statute: (1) this Commission, (2) the Appeal Board, and (3) the courts. Our task is to set the boundaries of this Commission's unfair practice jurisdiction. We believe we have unfair practice jurisdiction under *N.J.S.A.* 34:13A-5.4(a)(1) and (b)(1) to determine whether the statutory and structural conditions for deduction of representation fees are in place and under *N.J.S.A.* 34:13A-5.7 and 5.4.(a)(1) and (b)(1) to determine whether prohibited discrimination has occurred with regard to the payment of a representation fee. We believe the Appeal Board has jurisdiction to review the amount of any representation fee refund determination and the fairness and fullness of any particular representation fee proceeding leading to that refund determination. We believe the courts have sole jurisdiction to entertain constitutional challenges to the New Jersey representation fee statute until such time as that statute's constitutionality is finally and completely resolved.

We start our jurisdictional analysis by comparing our jurisdiction with that of the Appeal Board which the representation fee statute created. The essential distinction is that the Commission has unfair practice jurisdiction to consider allegations of structural defects in a demand and return system, but not to review the results of that proceeding.

N.J.S.A. 34:13A-5.7 explicitly incorporates the Commission's unfair practice jurisdiction under subsections

5.4(a)(1) and (b)(1) for the purpose of considering allegations of unauthorized discrimination between members and non-members with regard to payment of a representation fee. We also believe that *N.J.S.A.* 34:13A-5.6 implicitly incorporates the Commission's unfair practice jurisdiction under subsections 5.4(a)(1) and (b)(1) for the purpose of determining whether the statutory and structural conditions for deduction of representation fees are in place. The *Turnpike Authority* case held that section 5.3 of the Act is violated when a public employer and employee representative collect and expend representation fees in the absence of statutory authorization. *N.J.S.A.* 34:13A-5.5 authorizes the collection and expenditure of representation fees pursuant to a written agreement, but only provided certain conditions are met: (1) membership in the majority representative is available to all employees in the unit on an equal basis, and (2) the majority representative has established and maintained a demand and return system which allows a nonmember to obtain review of the amount of his representation fee through fair and full proceedings placing the burden of proof on the majority representative and culminating in an appeal to the tripartite Appeal Board. We have already held in *Jersey City* that failure to comply with the first condition constitutes an unfair practice. We hold today that failure to comply with the second condition also constitutes an unfair practice.

As already noted, the first draft of the bill which was ultimately enacted as *N.J.S.A.* 34:13A-5.5 *et seq.* empowered the Commission to resolve all representation fee challenges. The bill was subsequently revised, however, to substitute an Appeal Board for the Commission as the

proper body for reviewing the amount of any representation fee refund determination. It is thus the Appeal Board which has jurisdiction over such questions as the relationship of particular expenditures to terms and conditions of employment and the definition of member-only benefits. *In re Township of Teaneck*, D.U.P. No. 82-16, 8 *NJPER* 5 (¶13002 1981).

We find additional support for the basic distinction we draw between our jurisdiction to determine challenges concerning statutory and structural conditions and the Appeal Board's jurisdiction to determine challenges concerning the amount of representation fee refunds from the experience and case law of the New York Public Employment Relations Board ("PERB") in interpreting the similar representation fee provision of the Taylor Act.[27] In *Hampton Bays Teachers Association, NYSUT, AFT, AFL-CIO and Sullivan*, 14 PERB 3027 (¶3018 1981), PERB stated:

> This case presents a question not previously considered by this Board. Do we have jurisdiction to consider a charge that alleges only that the amount of an agency shop fee refund is incorrect? The hearing officer answered this question in the affirmative.

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[27] Section 208 of the Taylor Act, Civil Service Law, Article 14, authorizes the deduction of agency shop fees from the paychecks of non-members, provided the receiving employee organization ". . .has established and maintained a procedure providing for the refund to any employee demanding the return [*sic*] any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment. Nothing herein shall be deemed to require an employee to become a member of such employee organization."

We disagree.

Heretofore, we have asserted jurisdiction over charges alleging that prescribed agency shop fee refund structural procedures have been inadequate to satisfy the requirements of §208.3(b) that an employee organization "establish and maintain" a refund procedure as a condition for receiving agency shop fees. In *UUP and Eson*, 11 PERB ¶3068 (1978), we ruled that a refund procedure was inadequate, on its face, because its appellate mechanism imposed an unreasonable cost upon an agency shop fee payer who might choose to invoke it. We also found it inadequate because it did not apply to funds transmitted by the employee organization to its state and national affiliates. Subsequently, in the same case, we ruled that the implementation of the refund procedure was faulty because the appellate steps were being processed too slowly. 12 PERB ¶3093 (1979), confirmed *UUP v. Newman*, 77 AD2d 709 (Third Dept., 1980) 13 PERB ¶7010, mot. for lv. to appeal den., 51 NY2d 707 (1982), 13 PERB ¶7016.

We have also asserted jurisdiction to determine if an agency shop fee refund procedure was properly maintained, as required by the statute. This issue was raised by the charge that the employee organization did not provide the agency shop payer with sufficient information to make an intelligent choice whether or not to invoke the appellate steps. We did so in *UUP and Barry*, [13 PERB ¶3070] and in companion Case U-4372, herein before us.

We are now asked to go beyond the structural provisions of the refund mechanism and examine into the accuracy of its substantive final product. To

> determine whether this Board has the authority to make such inquiry, we must look at the express language of the agency shop fee provision and its relation to the basic rights granted to the employees by the statute. Section 208.3(b) provides that in order to be eligible for agency shop fee payments an employee organization must have "established and maintained" a refund procedure. We understand this language as referring to a process. The absence of such a process disqualifies an employee organization from receiving agency shop fee payments, and an employee organization which collects agency shop fee payments without such a process commits an improper practice subject to the jurisdiction of this Board. The requirement that the amount of the refund be correct is not stated in the Taylor Law but it is, of course, understood. The implication of this omission from the explicit provisions of the Taylor Law is that the improper practice jurisdiction of this Board may not be invoked to resolve disputes concerning the precise amount of the refund and a party aggrieved must look elsewhere for relief. We understand this to be the intent of the Legislature.
> *Id.* at 3031.

See also, *United University Professors, Inc. and Barry*, 15 PERB 4708 (¶4612 1982). Thus, in New York, which does not have an Appeal Board, challenges to the amount of a representation fee refund must be litigated through the courts.[28]

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[28] In New Jersey challenges to the amount of a representation fee *may* be litigated through the Appeal Board. It is not clear whether they *must* be litigated in that forum or whether representation fees may go directly to state or federal court without first resorting to the demand and

While we are not prepared to adopt the entire body of PERB case law concerning representation fee disputes and will decide such disputes on a case-by-case basis, we commend that body of law as a polestar for determining what types of procedural protection are appropriate or required.

We now consider this Commission's jurisdiction to entertain constitutional attacks upon the representation fee statute. We hold that such attacks should be raised in federal or state court proceedings.

This Commission's essential function is statutory implementation and interpretation of the New Jersey Employer-Employee Relations Act, not constitutional adjudication. As the Hearing Examiner correctly stated, an administrative agency must accept the constitutionality of a statute it administers until such time as a qualified judicial body rules it unconstitutional and void. *Johnson v. Robinson*, 415 *U.S.* 361 (1974); *Fischer v. Bedminster Tp.*, 5 *N.J.* 534 (1950); *Baldwin Constr. Co. v. Essex Cty Bd. of Tax.*, 24 *N.J. Super.* 252 (Law Div. 1952), aff'd 27 *N.J. Super* [*sic*] 240 (App. Div. 1953).[29]

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return system or the Appeal Board. In the federal court litigation, defendant unions asserted that non-members have the right to proceed directly to court under *Patsy v. Board of Regents*, ____ *U.S.* ____, 102 *S.Ct.* 2557 (1982) in order to vindicate their rights against unconstitutional uses of their money. Compare 45 U.S.C. §152 (Railway Labor Act authorizes union security provisions; non-members must go to court to challenge allegedly unconstitutional expenditures); *International Assn. of Machinists v. Street*, 367 *U.S.* 740 (1961); *Railway Clerks v. Allen*, 373 *U.S.* 113 (1963). Judge Debevoise did not resolve this mixed question of statutory interpretation and judicial jurisdiction nor do we.

[29] We have considered constitutional arguments when determining

That moment has not arrived in the federal litigation as of yet. Until such time, questions of constitutional law, rather than statutory unfair practice interpretation, must continue to be addressed to the courts.

We now apply these jurisdictional principles to the instant case in order to determine what claims are properly before us. Given the preceeding [*sic*] discussion, we will not entertain Kramer's attacks questioning the constitutionality of the representation fee statute, the composition of the Appeal Board, the Association's demand and return system, and the Association's dues structure. Nor will we entertain any challenges concerning the amount of any representation fee refunds. We specifically hold that the Hearing Examiner properly quashed the subpoena duces tecum for the financial records of the Association and its affiliates since these records were being sought to demonstrate that portions of the representation fees were allegedly being used for improper and unconstitutional purposes,[30] matters appropriately raised

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whether a matter is within the scope of collective negotiations. See, e.g., *In re Hunterdon Central H.S. Bd. of Ed.*, P.E.R.C. No. 80-4, 5 *NJPER* 289 (¶10158 1979), aff'd 174 *N.J. Super.* 468 (App. Div. 1980), aff'd o.b. 86 *N.J.* 43 (1981). Such determinations, however, do not require us to pass upon the constitutionality of the Act we administer, but rather upon whether the parties' proposals or actions are within the scope of the Act, given constitutional concerns. Similarly, while this Commission cannot resolve constitutional attacks on the representation fee statute, constitutional concerns might be relevant to interpreting the scope of the statutory and structural conditions to representation fee deductions. See, e.g., *International Ass'n of Rail* [*sic*] *Machinists v. Street*, *supra*.

[30] The issuance of a Complaint on the amended charge was not improper since it was not until now that we had an opportunity to delineate the boundaries of this Commission's jurisdiction. Under *N.J.A.C.* 19:14-2.1, the Director of Unfair Practices ordinarily will issue a Com-

before the Appeal Board and the courts. We will, however, consider Kramer's contentions that the Association's demand and return system was non-existent or structurally defective, that the Association interfered with, restrained and coerced the right of non-members not to join the Association, that the Association failed to give Kramer adequate notice of its rebate procedures and demand and return system, and that the dues deduction system was administered discriminatorily and improperly.

The Hearing Examiner found that the Act was violated when representation fees were taken from Kramer's paycheck, albeit retroactively, for the month of September, 1981 since the Association's demand and return system was not established until September 30, 1981. Based on a literal reading of the second condition set forth in *N.J.S.A.* 34:13A-5.6, we concur: no representation fees may be available to the majority representative unless that representative has already established a demand and return system.

The Hearing Examiner also determined, implicitly, that as of September 30, 1981, the Association had established a demand and return system and thus satisfied section 5.6's second requirement for deduction. We concur.

The demand and return system which the Association adopted at its September 30, 1981 meeting on its face satisfies *N.J.S.A.* 34:13A-5.6. It explicitly provides for

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plaint if the unfair practice charge's allegations (assuming their truth) *might* constitute a violation of the Act; the word "might" ordinarily requires issuance when arguable or novel questions of law are present. *In re New Jersey Turnpike Auth.*, P.E.R.C. No. 80-106, 6 *NJPER* 106 (§11055 1980). That was the situation here.

the computation of a final rebate based on the applicable legislative standards within 30 days after the end of the pertinent fiscal year, review proceedings before a Regional Review Panel in which the Association must carry the burden of proof and in which the non-member and/or his or her representative has a full opportunity to participate, a decision by that panel within 30 days of the non-member's challenge, and an appeal to the statutorily created Appeal Board. We believe that the Legislature contemplated that such a system on its face would constitute an acceptable demand and return system.[31]

Kramer contends that the demand and return system was not in existence because she was unsuccessful in her attempts to use it. We disagree.

The record shows that in November, 1981, Kramer made a claim under the demand and return system for any amounts the Association improperly received; the Association notified Kramer it had received her claim and that although there would not be a preliminary rebate, she would receive any final rebate by September 30, 1982; and at the time of the hearing (September 13, 1982) the Association was still in the process of a financial audit to determine the amount, if any, of the final

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[31] A facially adequate system may, of course, be administered unfairly, too slowly, or discriminatorily and thus result in the finding of an unfair practice concerning the manner in which it is "maintained." See, e.g., *United University Professors, Inc. and Barry*, 16 PERB 3060 (¶3040 1983). We also note our disapproval of the provision in this case making posting the means of notifying non-members of their rights and the applicable procedures, see *infra* at pp. 38-39, but believe this defect can be corrected without invalidating the entire demand and return system.

rebate. Under all these circumstances, we find that the Association had established and was in the process of maintaining its demand and return system, including consideration of Kramer's claim, at the time of the hearing.

The Hearing Examiner found that the Association did not interfere with, restrain or coerce Kramer or other non-member employees in the exercise of their right not to join the Association. Under all the circumstances of this case, we disagree.[32]

The October 7, 1981 letter from the Association soliciting non-members to join was ambiguous and potentially misleading. That letter stated that all non-members who did not join the Association by October 15, 1981 would have representation fees in the amount of 85% of Association dues deducted from their paychecks. It then offered each non-member two choices: (1) joining the Association with payment in full of the dues by October 15 or (2) joining as an automatic payroll deduction member with monthly dues deductions. Without an additional statement clarifying that non-members had no obligation to join the Association, a non-member might have construed the letter to mean that he became a member after October 15 by commencement of automatic monthly payroll deductions from his paycheck;

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[32] We agree with the Hearing Examiner that there is no evidence (except to the extent deductions were made for September, 1981, without statutory authorization) that the Board interfered with such rights or "pushed" anyone to become a member. The Board has not excepted to the Hearing Examiner's finding of a violation against it with respect to the September, 1981 deduction and only objects to being required to reimburse Kramer.

this construction would be an erroneous one, but not a wholly implausible one to a reader who did not study the letter and distinguish between "dues" and "fees" based on dues. In addition, the Association's conduct towards Kramer after this letter was objectionable. The president told Kramer that she could "hire a lawyer" if she did not like her two "choices," and only conceded that she did not have to join the Association after she reminded him of that fourth choice. The membership chairman refused to give Kramer a written statement concerning her dues. Finally, the NJEA representative told Kramer that he did not have to talk to a non-member about her representation fees.[33] All these statements reflect an unacceptably grudging attitude towards the rights of non-members to refrain from joining the Association and to secure information concerning the representation fee system.[34]

The Hearing Examiner declined to determine whether

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[33] It is not material that Kramer actually knew that she did not have to join the Association and indeed so told the Association president. The unfair practice occurred under *N.J.S.A.* 34:13A-5.6 and 5.4(b)(1) because the letter and subsequent events reasonably tended to interfere with the rights of non-members, such as Kramer, not to join the Association. *In re Commercial Twp. Bd. of Ed.*, P.E.R.C. No. 83-25, 8*NJPER* 550 (¶13252 1982).

[34] We disagree, however, with Kramer's contention that the Association's failure to provide her with a copy of the collective negotiations agreement before December 3, 1981 either independently violated the Association's duty of fair representation or otherwise evidenced coercion. The record shows that all unit members received a copy of the collective negotiations agreement, the delay in distribution of the agreement resulted from the necessity of having the agreement typed, and Association representatives fairly answered Kramer's questions about the pertinent contractual provisions.

a failure to publicize a demand and return system violates the Act because Kramer did not prove that she was unable to see a copy of the demand and return system. We agree with Kramer that the majority representative has an affirmative obligation to notify personally all non-members paying representation fees of their rights under a demand and return system and the procedures for invoking these rights.

In *Public Employees Federation and Kahn*, 15 PERB 3016 (¶3011 1982), PERB held that a majority representative violated the Taylor Law when it communicated its agency shop refund procedures to non-members by merely providing an outline of these procedures on the inside page of its newsletter. The Board specifically held that this means of communication was not likely to be read by persons who pay an agency shop fee. The Board instead required the majority representative to mail each non-member notice of its refund procedure. See also, *United University Professors, Inc. v. Eson*, 11 PERB 3113 (¶3074 1978); *cf. Mullane v. Central Hanover Bank and Trust Co.*, 339 *U.S.* 306 (1950) (federal constitution requires that means of service of process be reasonably calculated to reach persons affected).

We believe that majority representatives collecting representation fees have an affirmative obligation to inform non-members personally of the pertinent rights and procedures concerning representation fee challenges. The statutory rights afforded by *N.J.S.A.* 34:13A-5.6 may be meaningless if an affected non-member never learns in the first place of those rights and the applicable procedures. The burden on the majority representative of per-

sonally notifying each non-member of such rights and procedures is minimal compared to the amount of representation fees paid by each non-member and is outweighed by the risk that non-members will not learn of their rights in the absence of personal notification. Accordingly, the Association violated *N.J.S.A.* 34:13A-5.6 and 5.4(b)(1) when it failed to notify Kramer and other non-members personally of their rights under the demand and return system and the procedures for obtaining a rebate.[35]

We next consider Kramer's contention that the dues deduction system was administered discriminatorily and improperly. We disagree for the most part, but do find one violation.

N.J.S.A. 52:14-15.9(e) authorizes payroll deductions of union dues when a member of an employee organization gives written consent for such deductions. *N.J.S.A.* 34:13A-5.6 provides for an automatic payroll deduction of representation fees; there is no requirement that non-

[35] We also agree with Kramer that the absence of personal notification was particularly objectionable under all the circumstances of this case since she was being asked to make a fast decision whether to join the Association in the face of incomplete information. We disagree, however, with Kramer's contention that the notice of rebate procedure was too generalized and lacked sufficient information concerning the purpose and amount of expenditures. The notice was sufficient to inform non-members how to trigger the rebate process. No further explanation was necessary concerning the preliminary rebate determination. Once, however, a final rebate determination is made, the majority representative may be under an obligation to provide the financial data on actual expenditures necessary to enable a non-member to determine whether to process further his claim. See, e.g., *Public Employees Federation v. PERB*, 16 PERB 7022 (¶7015 1983) (N.Y. Supreme Court, Appellate Division, Third Department, April 7, 1983).

members give prior consent to the deduction of such fees. *N.J.S.A.* 34:13A-5.7 prohibits discrimination between non-members with regard to the payment of such fees other than as allowed by the Act. Under the circumstances of this case, we believe that the system for deducting representation fees generally did not improperly discriminate between members and non-members with regard to the payment of fees, but that one statement of an NJEA representative did violate the Act. The collective negotiations agreement specifically provides that the mechanics for the deduction and transmission of representation fees must, as nearly as possible, be the same as the mechanics used for the deduction and transmission of regular membership fees to the Association. The agreement further provides that the Association may only request automatic payroll deductions from the paychecks of those non-members who have not already paid the full amount of fees directly to the Association. If members of the Association do not pay their dues directly in cash to the Association, the Board deducts their dues from their paychecks upon a billing from the Association. There is no record evidence to suggest that deductions of members' dues occur substantially later than deductions of representation fees. Thus, the representation fee deduction system generally appears to satisfy 5.7's injunction against discriminatory practices with regard to the payment of fees. We find, however, that the NJEA representative, contrary to the collective negotiations agreement, misrepresented to Kramer that she could not pay her representation fees in a lump sum advance and that only members had that privilege. We believe that this misrepresentation violated the NJEA's duty of fair representation towards non-members who paid representation fees

which the NJEA received.

Kramer also contends that the Association's two-tiered dues structure violates the Act. We disagree. The dues structure does not discriminate between the rights of non-members and members with regard to the payment of dues and fees; instead, it merely distinguishes in setting dues and fees between the positions of professional employees and supportive staff employees based on their incomes. Non-member teachers such as Kramer are treated in precisely the same fashion as member teachers. We see nothing in the representation fee statute which prohibits majority representatives from adjusting membership dues in consideration of differences in employee income. See, e.g., *Opinion of Counsel*, 11 N.Y. PERB 5009 (¶5008 1978) (part-time employees may be assessed lower membership dues than full-time employees).[36]

ORDER

I. The Respondent Boonton Education Association is ordered to:

A. Cease and desist from:

1. collecting a representation fee in lieu of dues from paychecks of non-members such as Judith Kramer dur-

[36] We disagree with the Hearing Examiner on this issue to the extent he found it was not raised in the pleadings. We do not believe, however, that the pleadings or the litigation at the hearing fairly placed in issue the validity of the Association's unified dues structure. Indeed, the original charge against the Association and the NJEA noted, without objection, their unified status.

ing any month that a demand and return system is not in place;

2. interfering with, restraining and coercing non-members such as Judith Kramer in the exercise of their rights not to join the Association by sending non-members ambiguous and potentially misleading letters concerning Association membership and by responding to inquiries concerning the representation fee system in a grudging manner; and

3. failing to give personal notice to each non-member of the demand and return system which has been established and the procedures for obtaining a rebate.

B. Take the following affirmative action:

1. pay to Judith Kramer the sum of $19.04 together with interest of 12% per annum to be computed commencing from the date of February 1, 1982;

2. notify personally each non-member of the demand and return system which has been established and the procedures for obtaining rebate;

3. post in all places where it normally posts notices to unit employees, and serve personally upon each non-member, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken by the Respondent Boonton Education Association to insure that such notices are not altered, defaced or covered by other materials;

4. notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Boonton Education Association has taken to comply herewith.

II. The Respondent New Jersey Education Association is ordered to:

A. Cease and desist from:

1. interfering with, restraining, and coercing non-members such as Judith Kramer in the exercise of their right not to join the Boonton Education Association by stating that non-members are not allowed to make advance lump sum payments of their representation fees rather than have their fees deducted;

B. Take the following affirmative action:

1. post in all places where the Boonton Education Association normally posts notices to unit employees, and serve personally upon each non-member, copies of the attached notice marked as Appendis [*sic*] "B." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by

the Respondent New Jersey Education Association to insure that such notices are not altered, defaced or covered by other materials;

4. notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent New Jersey Education Association has taken to comply herewith.

III. The Respondent Board of Education of the Town of Boonton is ordered to:

Cease and desist from deducting a representation fee in lieu of dues from the paychecks of non-members such as Judith Kramer during any month that the Boonton Education Association does not have a demand and return system in place.[37]

BY ORDER OF THE COMMISSION

/s/ James W. Mastriani

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Suskin voted in favor of this decision. Commissioner Graves voted against the decision. Commissioners Hipp

[37] Since it is undisputed that the Association has already received and presumably spent the money deducted from Kramer's paycheck, we believe the Association is liable for Kramer's recovery of that money.

and Newbaker abstained.

Commissioner Suskin dissented from that part of the decision finding an unfair practice based on the Association's failure to send personal notices to every non-member.

Commissioner Butch dissented from that part of the remedy ordered by the Commission which directed the Association to refund, with interest, the fee paid by the Charging Party for the month of September 1981.

DATED: Trenton, New Jersey
July 15, 1983
ISSUED: July 18, 1983

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

WE HEREBY NOTIFY EMPLOYEES OF THE COLLECTIVE NEGOTIATIONS UNIT THAT WE REPRESENT:

WE WILL NOT collect a representation fee in lieu of dues from the paychecks of non-members during any month that a demand and return system is not in place; we violated the New Jersey Employer-Employee Relations Act when we collected a representation fee from the paycheck of Judith Kramer for the month of September, 1981. We will pay Judith Kramer the sum of $19.04 plus 12% interest per annum in order to remedy this violation.

WE WILL NOT interfere with, restrain or coerce non-members in the exercise of their right not to join the Boonton Education Association by sending non-members ambiguous and potentially misleading letters concerning Association membership and by responding to inquiries concerning the representation fee system in a grudging manner; we violated the New Jersey Employer-Employee Relations Act when we circulated an ambiguous and potentially misleading letter dated October 7, 1981 to non-members and when our representatives answered Judith Kramer's subsequent inquiries in a grudging manner.

WE WILL personally notify all non-members of their rights under the demand and return system we have established and the procedures for seeking a representation fee rebate under that system; we violated the New Jersey Employer-Employee Relations Act when we failed to notify personally non-members of such rights and procedures.

BOONTON EDUCATION ASSOCIATION

Dated _____ By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

WE HEREBY NOTIFY EMPLOYEES OF THE COLLECTIVE NEGOTIATIONS UNIT WHICH THE BOONTON EDUCATION ASSOCIATION REPRESENTS THAT:

WE WILL NOT interfere with, restrain, or coerce non-members of the Boonton Education Association in the exercise of their right not to join the Association by stating that non-members are not allowed to make advance lump sum payments of their representation fees rather than have their fees deducted; we violated the New Jersey Employer-Employee Relations Act when one of our field representatives incorrectly told Judith Kramer that non-members did not have the right to make advance lump sum payments of their representation fees.

NEW JERSEY EDUCATION ASSOCIATION

Dated _____ By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

APPENDIX A-3

Notice of Appeal to the
Supreme Court of the United States
July 11, 1985

SUPREME COURT OF NEW JERSEY
23,330 SEPTEMBER TERM 1984

JUDITH KRAMER,
Appellant-Appellant,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON,
Respondent-Respondent.

JUDITH KRAMER,
Appellant-Appellant,

v.

BOONTON EDUCATION ASSOCIATION AND NEW JERSEY EDUCATION ASSOCIATION
Respondent-Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

July 11, 1985

Notice is hereby given that the Appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey entered in this matter on June 25, 1985.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

MESIROV, GELMAN, JAFFE, CRAMER & JAMIESON
Attorneys for Appellant

By: /s/ Jeffry A. Mintz
Jeffry A. Mintz

Of Counsel, *Pro Hac Vice*:

NELSON R. KIEFF, Esquire
8001 Braddock Road
Springfield, Virginia 22160

APPENDIX B-1

First and Fourteenth Amendments to
the United States Constitution, and
42 U.S.C. § 1983.

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B-2

New Jersey [Public] Employer-Employee Relations Act, N.J.S.A. 34:13A-2, -3(e), -5.3.

CHAPTER 13A. NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

34: 13A-2. Declaration of policy

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, *both in the private and public sectors*: that strikes, and lockouts, *work stoppages* and other forms of industrial *employer and employee* strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic *and public* waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such *public and private employer-employee* disputes under the guidance and supervision of a governmental agency will tend to promote permanent, industrial *public and private employer-employee* peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this act is hereby declared as a matter of legislative determination. Amended by L. 1968, c. 303, § 3, eff. July 1, 1968.

34:13A-3(e)

The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee,

group of public employees, or public employee association to act on its behalf and represent it or them.

34:13A-5.3 Employee organizations; right to form or join; collective negotiations

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity: provided, however, that this right shall not extend to ~~any managerial executive~~ *elected officials, members of boards and commissions, managerial executives, or confidential employees*, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations: and provided further, that, except where established practice, prior agreement or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting: (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative: and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable

times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. *Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.*

L. 1968, c. 303, § 7, eff. July 1, 1968. Amended by L. 1974, c. 123, § 4.

APPENDIX B-3

1980 "Representation Fee" Amendments to
the Act, N.J.S.A. 34:13A-5.5, -5.6.

1980 "REPRESENTATION FEE" AMENDMENTS TO THE ACT - N.J.S.A. 34: 13A - 5.5 - 5.6

34:13A-5.5 Representation fee in lieu of dues; negotiation; agreement; amount; pro rata returns; grounds; proceedings

a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with section 3 of this act, a return of any part of that fee paid by

him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment of applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer.

L. 1979, c. 477, § 2, eff. July 1, 1980.

34:13A-5.6 Payroll deduction; rights of majority representative; conditions; demand and return system; board for appeals

Where a negotiated agreement is reached, pursuant to section 2 of this act, a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative: provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2(c). The demand and return system shall include a

provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve without compensation but shall be reimbursed for actual expenses reasonably incurred in the performance of their official duties. Of such members, one shall be representative of public employers, one shall be representative of public employee organizations and one, as chairman, who shall represent the interest of the public as a strictly impartial member not having had more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment. Of the first appointees, one shall be appointed for 1 year, one for a term of 2 years and the chairman, for a term of 3 years. Their successors shall be appointed for terms of 2 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant. Nothing herein shall be deemed to require any employee to become a member of the majority representative.

L. 1979, c. 477, § 3, eff. July 1, 1980.

APPENDIX B-4

Legislative History of 1980 Amendments to the New Jersey [Public] Employer-Employee Relations Act

ASSEMBLY, No. 688

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 9, 1978

By Assemblymen PATERO, JACKMAN and Assemblywoman TOTARO

Referred to Committee on Labor

An Act to amend and supplement the "New Jersey Employer-Employee Relations Act," approved April 30, 1941, (P. L. 1940, c. 100, C. 34:13A-1 et seq.), as said short title was amended by P. L. 1968, c. 303.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P. L. 1974, c. 123 (C. 34:13A-5.4) is amended to read as follows:

* * *

e. *The commission shall have the exclusive power as hereinafter provided to hear and decide all issues in a fair share fee challenge.*

[e.] f. The commission shall adopt such rules as may be required to regulate the conduct of representation elections, and to regulate the time of commencement of negotiations and of institution of impasse procedures so

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submitted dates.

[f.] g. The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

2. (New section) Notwithstanding any other provisions to the contrary, no majority representative of public employees in an appropriate unit or public employer of such employees shall be denied from executing an agreement to require the payment by all employees in the unit to the majority representative of a fair share fee for services rendered by the majority representative, subject to the provisions hereinafter stated.

3. (New section) a. The fair share fee for services rendered by the majority representative shall be in an amount equal to the regular membership dues, initiation fees and assessments of the majority representative, less the cost of benefits financed through the dues and available only to members of the majority representative, but in no event shall the fee exceed 85% of the regular membership dues, fees and assessments. Such sum representing a fair share fee shall not reflect the costs of financial support of political causes or candidates except to the extent that it is necessary for the majority representative to engage in lobbying activity designed to foster its

policy goals in collective negotiations and contract administration and to secure for the employees it represents advances in wages, hours and other conditions of employment which ordinarily cannot be secured through collective negotiations with the public employer.

b. The majority representative shall provide advance written notice of the amount of the fair share fee assessment to the commission, the public employer and to all employees within the unit as shall be determined by a list of such employees furnished by the public employer. Any challenge to an assessment by an employee shall be filed in writing with the commission, the public employer, and the majority representative within 30 days after receipt of the written notice by the employee. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the majority representative.

c. The public employer shall deduct the fee from the earnings of the employee and transmit the fee to the majority representative pursuant to section 4 of this act after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the public employer pending a decision by the commission pursuant to section 1 of this act.

4. (New section) Payment of the fair share fee shall be made to the majority representative, during the term of the collective negotiation agreement affecting such employee and during the period, if any, between successive agreements so providing, on or after, but in no case sooner than:

a. The thirtieth day following notice of the amount of the fair share fee as provided for insection 3.b. of this act.

* * *

5. (New section) No agency shop agreement executed pursuant to this act:

a. Shall take effect until the majority representative has established a procedure by which a nonmember employee in the unit can challenge the assessment provided for in section 3 of this act. Such procedure shall allow for a determination by the commission which may be appealed to the Appellate Division of the Superior Court.

* * *

STATEMENT

This public sector "agency shop" bill, a significant revision of previous legislation on the subject, was drafted to include a "fair share" formula for payroll deductions and procedural due process provisions intended to protect the rights of the minority without destroying the rights of the majority.

For many years, the "New Jersey Employer-Employee Relations Act" has required that a majority representative of public employees which has negotiated a labor agreement covering such employees to represent the interests of *all* employees in the bargaining unit, regardless of organizational membership, without discrimination. Non-members of the majority organization, therefore, enjoy virtually equal benefits and protections

without sharing in the costs, incurred by collective negotiations, grievance representation, and other services. In the recent May, 1977 decision of the United States Supreme Court (*Abood et al. v. Detroit Board of Education et al.*) which upheld the constitutional validity of state "agency shop" legislation, the Court pointed to the fact that the tasks of negotiating and administering an agreement are continuing and difficult ones and entail the expenditure of much time and money, often requiring the services of lawyers, expert negotiators, economists, research staff, as well as administrative personnel. In that decision, the Court went on to state that "a union shop arrangement has been thought to distribute fairly the costs of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free-riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." Many analysts feel that union security agreements such as the agency shop are vital to the stability and sense of responsibility of public sector unions.

The proposed actual amount of the fair share fee to be deducted is to be equal to regular dues, initiation fees and assessments less the cost of benefits financed through the dues and available only to members—and in no event greater than 85% of dues—similar to legislation now in effect in Minnesota. Due process guarantees in the bill provide that a (non-member) public employee will have (a) the right to advance notice of the amount of an impending fair share fee to be deducted from his earnings; (b) the right to bring an administrative action thay may be appealed in court to challenge the amount

of the withheld fee; and (c) the right to have the fair share fee held in escrow pending such a determination.

When considering challenges to a union's use of service fees, however, the Commission and the courts would be expected to distinguish between political activities which are partisan or idealogical and lobbying activities which are integral to economic well-being of all employees represented.

ASSEMBLY LABOR COMMITTEE
STATEMENT TO
ASSEMBLY, No. 688
with Assembly committee amendments

STATE OF NEW JERSEY

DATED: JUNE 19, 1978

The Assembly Labor Committee favorably reports this legislation to establish a modified "agency shop" in the public sector as a required subject of negotiations at the request of the majority representative. The statement appended to and printed with the bill adequately explains its provisions except that amendments adopted by the committee alter the description contained in the statement's last two paragraphs.

Within a given negotiating unit, this bill is intended to protect the rights of nonmembers of a public employee union without unfairly burdening its regular members with the cost of union services benefiting the nonmembers in the unit. Existing law requires all majority representatives of public employees to represent the interests of all employees in the negotiating unit, regardless of membership, without discrimination. The legislation would not require any public employee to actually join a union against his wishes. Moreover, the bill's provisions would not apply to public employees who are not a part of an existing negotiating unit represented by a majority employee organization.

The Public Employment Relations Commission had

indicated to the committee that the role originally intended for it as an arbiter of fee challenges would have placed a heavy administrative burden on it and slowed its processing of unfair labor practice charges as well as scope of negotiation and unit determinations. At the urging of a coalition of public employee associations and unions, the committee amended the bill along the lines of a recommendation contained in the U.S. Supreme Court's "*Abood*" decision (425 U.S. 949), which upheld the constitutional validity of state "agency shop" legislation. That suggestion was for a "demand and return" refund system based on a rebate after objection of any portion of fees used by the union for partisan political or ideological purposes only incidentally related to the terms and conditions of employment. The pro rata share of expenditures by the majority representative subject to refund to a nonmember, where an objection is made, would also have to include the costs of "any other benefits available only to members," e.g. contributions to charitable or religious organizations or causes; fines, penalties or damages arising from the unlawful activities of a bargaining agent; social or recreational activities; costs of educational activities unrelated to collective negotiations, contract administration or lobbying for improved wages and benefits; costs of medical insurance; retirement benefits or other benefit programs; and costs incurred by the bargaining agent to organize employees who are not included in the bargaining unit.

Under the terms of the bill, as amended, nonmembers can appeal the amount of any union-determined rebate by bringing their cases (individually or collectively) before a three-member tripartite board with staggered terms which would be appointed by the Governor with

the advice and consent of the Senate. It would have a strictly impartial chairman, representing the interest of the public, who has had no more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment.

The bill was opposed by the New Jersey School Boards Association, the New Jersey State Chamber of Commerce and the New Jersey Business and Industry Association. It was supported by the State Coalition of Public Employees (S. C. O. P. E.) which included the NJCSA, the NJSEA, AFSCME, the NJEA and AFT as well as the NJFBA, IFA, PBA, IFPTE, the Service Employees International Union and the Teamsters.

ASSEMBLY COMMITTEE AMENDMENTS TO

ASSEMBLY, No. 688

STATE OF NEW JERSEY

ADOPTED JUNE 12, 1978

Amend page 3, section 1, lines 74-75, omit in their entirety.

Amend page 3, section 1, line 76, omit "f.", insert "e.".

Amend page 3, section 1, line 32, omit "g.", insert "f.".

Amend pages 3-5, sections 2-5, omit in their entirety, insert new sections 2 through 5 as follows:

"2. (New section) a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all employees in the unit to the majority representative of a representative fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

b. Public employees in an appropriate unit who are not members of the majority representative in that unit shall be subject to a payroll pay deduction of a representation fee in lieu of dues to the majority representative, as provided in section 3 of this act. The representation fee in lieu of dues shall be equivalent to the dues, initiation fees and assessments charged by the majority representative to its own members.

c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with section 3 of this act, a return of any part of that fee which represents the employee's pro rata share of expenditures by the majority representative in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. The pro rata share subject to refund shall also reflect the cost of any other benefits available only to members of the majority representative. The pro rata share shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer.

3. (New section) Where a negotiated agreement is reached pursuant to section 2 of this act, a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2 (c). The demand and return system shall include a provision by which persons who

pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve without compensation but shall be reimbursed for actual expenses reasonably incurred in the performance of their official duties. Of such members, one shall be representative of public employers, one shall be representative of public employee organizations and one, as chairman, who shall represent the interest of the public as a strictly impartial member not having had more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment. Of the first appointees, one shall be appointed for 1 year, one for a term of 2 years and the chairman, for a term of 3 years. Their successors shall be appointed for terms of 2 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant. Nothing herein shall be deemed to require any employee to become a member of the majority representative.

* * *

FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE
FEBRUARY 27, 1980

FOR FURTHER INFORMATION
PATRICK J. SWEENEY

Governor Brendan Byrne today signed the following bills in a public ceremony in the Chambers of the New Jersey State Assembly:

A-688, sponsored by Assemblyman Joseph D. Patero (D-Somerset), which is known as the "agency shop" bill. The bill requires payment of a "representation fee in lieu of dues" to the majority representative union by non-members.

The representation fee is to be the equivalent of regular membership dues, initiation fees and assessments, less the cost of benefits so financed which are available only to members. In no event, however, can the representation fee exceed 85 percent of the regular charges.

In addition, a non-member who pays the representation fee may receive refund on a pro rata basis of the cost of: (1) political or ideological activities which are only inadvertently related to the employment; or (2) other benefits available only to members. This does not include lobbying connected with the terms or benefits of the employment.

The bill will take effect on July 1, 1980.

* * *

APPENDIX B-5

N.J.A.C. 1:20-1.1 *et seq.*

OFFICE OF ADMINISTRATIVE LAW

TITLE 1

RULES OF SPECIAL APPLICABILITY

CHAPTER 20

HEARINGS BEFORE THE PUBLIC EMPLOYEE RELATIONS APPEAL BOARD

September 20, 1983

SUBCHAPTER 1. APPLICABILITY AND DEFINITIONS

1:20-1.1 Applicability

In addition to the Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1, the following rules of special applicability[1] shall apply to any hearing initiated before the Public Employment Relations Commission Appeal Board pursuant to P.L. 1979, c.477, (N.J.S.A. 34:13A-5.5. et seq.) To the extent that these rules of special applicability are inconsistent with the UAPR, these rules shall apply.

---

[1] An attempt has been made to codify these rules of special applicability so that their subchapter designations are generally consistent with the subchapter designations of corresponding subject matter in the Uniform Administrative Procedure Rules of Practice. Thus, Subchapter 1. of these special rules deals with Applicability and Definitions, since Subchapter 1. of the UAPR (N.J.A.C. 1:1-1) deals with Applicability and includes definitions. This method of codification is for the sake of the user's convenience only, and has no legal implications or effects.

* * *

SUBCHAPTER 4. TIME FOR FILING OF PETITION AND ANSWER

1:20-4.1 Time for filing of petition; exhaustion of demand and return system

(a) At any time after the nonmember has exhausted, or has made a good faith attempt to exhaust, the demand and return system required to be maintained by the majority representative, the nonmember may file a petition with Appeal Board.

(b) If during the administrative processing of the petition of appeal, it is determined that the majority representative's demand and return system has either not been utilized to resolve the dispute or that the demand and return proceeding has not been completed, the Appeal Board may take whatever action it deems appropriate, including but not limited to dismissing the petition of appeal, staying proceedings before the Board pending the completion of the majority representative's demand and return system, or continue to process the petition.

(c) A nonmember of a majority representative who has a claim pending in the majority representative's demand and return system may intervene in a proceeding before the Appeal Board involving the same majority representative, collective negotiations agreement, public employer and the same period of time, notwithstanding that the nonmember has not yet exhausted the majority representative's demand and return system.

1:20-4.2 Time for filing answer

No later than 20 days from the date of service of the petition upon the respondent by the petitioner, the respondent shall file with the Appeal Board and serve upon the petitioner an answer to the petition. For good cause, the Appeal Board may extend the time for answer. Failure to file and serve an answer on time may result in a default judgment against the respondent.

* * *

SUBCHAPTER 6. PETITION AND ANSWER

1:20-6.1 Contents of petition

(a) A petition shall be in writing and signed by the nomember(s) making the complaint. More than one nonmember in the same negotiations unit may sign a petition.

(b) A blank form for filing such a petition will be supplied upon request. Requests shall be addressed to: Public Employment Relations Commission Appeal Board, 429 East State Street, Trenton, NJ 08608.

(c) The petition shall contain the following:

1. The full name, address and telephone number of the nonmember filing the petition and, where applicable, the name, address and telephone number of any autho-

rized representative;

2. The full name and address of the majority representative of the nonmember's collective negotiations unit;

3. The full name and address of the public employer of the nonmember filing the petition;

4. The amount of the representation fee in lieu of dues, and, where known, the amount of the regular membership dues, initiation fees and assessments charged by the majority representative to its own members;

5. A statement of the grounds for the nonmember's belief that the representation fee in lieu of dues is excessive or improper, including a brief recitation of the facts, if any, which give rise to the belief that the fee is excessive. It shall be sufficient for the petitioner to state opposition either to all expenditures of a political or ideological nature only incidentally related to the terms and conditions of employment, or to expenditures applied toward the costs of any benefits available only to members of the majority representative, or to both; and

6. A statement as to whether the nonmember filing the petition has exhausted the majority representative's demand and return system and the result of that proceeding. If the result of that proceeding was in written form, a copy of the writing should be appended to the petition.

(d) The petition shall constitute the first pleading for

the purposes of N.J.A.C. 1:1-6.2.

1:20-6.2 Contents of answer

(a) An answer shall be in writing and signed by a representative of the respondent.

(b) An answer shall contain the following:

1. A statement of the amount of the regular membership dues, initiation fees and assessments charged by the majority representative to its own members in the petitioner's collective negotiations unit;

2. A statement of the representation fee in lieu of dues charged the petitioner;

3. A description of the disposition of the petitioner's demand and return system proceeding. A copy of any written decision or result of that proceeding shall be appended as an exhibit to the answer, unless it has been appended to the petition;

4. A clear and concise statement which specifically admits, denies or explains any factual allegations contained in the petition; and

5. Any affirmative defenses to the legal and factual allegations of the petition.

* * *

SUBCHAPTER 15. EVIDENCE

1:20-15.1 Evidence of demand and return proceedings

The record, or any portion of it, developed at the demand and return system proceeding may be introduced as evidence by either party, subject to the general rules of evidence contained in N.J.A.C. 1:1-15.

* * *

SUBCHAPTER 16. CONCLUSION OF HEARING

1:20-16.1 Oral argument on exceptions

(a) As part of any written exceptions to an initial decision, a party may file a written request for oral argument on the exceptions before the Appeal Board. The written request shall be served, along with the exceptions, upon the other parties to the hearing.

(b) If the Appeal Board grants the request for oral argument, the Appeal Board shall give each party at least five days notice of the date of the argument.

(c) Only issues and evidence of record at the hearing may be considered at the oral argument. No new issues or evidence may be presented.

1:20-16.2 Motion to reopen

A party to a proceeding before the Appeal Board may, because of extraordinary circumstances, move to reopen the matter after the Appeal Board decision has been ren-

dered. The movant shall state with particularity the grounds claimed and, where applicable, shall specify the portion of the record relied upon. Any motion pursuant to this section shall be filed within 15 days after service of the Appeal Board decision. Copies shall be served on the parties of record, and a statement of service shall be filed with the motion papers. The filing and pendency of a motion for reconsideration shall not operate to stay the effectiveness of the Appeal Board decision unless otherwise ordered by the Appeal Board. A motion to reopen need not be filed to exhaust administrative remedies.

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No. 85-684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN THE MATTER OF JUDITH KRAMER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

SUPPLEMENTAL BRIEF

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November 4, 1985

BEST AVAILABLE COPY

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Respondents.

SUPPLEMENTAL BRIEF

ADDITIONAL REASON FOR GRANTING THE WRIT

One Day After the Filing of the Instant Petition the U.S. Court of Appeals for the Fourth Circuit Decided the Case of *Beck v. Communications Workers of America*. In *Beck* the Court Held That the First Amendment to the Constitution of the United States Interdicts Governmental Authority to a Union to Compel Employees to Finance the Union's "Labor Legislation" Activities. That Holding Is in Direct Conflict With the Holding of the Supreme Court of New Jersey in the Case at Bar and With the Holding of the U.S. Court of Appeals for the Third Circuit in the *Robinson* Case.

On October 23, 1985 Petitioner, Judith Kramer, filed the instant petition. On October 24, 1985 the U.S. Court of Appeals for the Fourth Circuit decided the case of *Beck v. Communications Workers of America*, No. 83-1955. In her petition Mrs. Kramer contended that, by sanctioning compulsory financing of union lobbying activities, the decision below was in direct conflict with the decision in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). *See* Petition at 12. In *Beck* the court followed *Abood* to hold that government may not constitutionally compel employees to finance union "labor legislation" activities. *Beck* at 30, 35-36, 46-47, 57-58. That holding brings the Fourth Circuit into direct conflict with the decision of the U.S. Court of Appeals for the Third Circuit in *Robinson v. New Jersey*, 741 F.2d 598 (1984) and with the decision below. The obvious split in the circuits on this vital issue of First Amendment concern presents an additional compelling reason for granting the petition and occasions the filing of this supplemental brief in accordance with Supreme Court Rule 22.6.

In *Beck* the Communications Workers of America appealed a district court ruling which held that the Constitution required that the agency shop authorization in the National Labor Relations Act, 29 U.S.C. § 158(a)(3), be construed to preclude collection of monies to subsidize "labor legislation" expenditures of the union. In affirming the district court, the court of appeals looked to this Court's "agency shop" decisions. It found that in *IAM v. Street*, 367 U.S. 740 (1963), this Court denied unions the power to use compulsory fees to "'support candidates for public office' or to 'advance political programs' because those were not uses which help 'defray

the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes.'" *Beck* at 26-27, quoting *Street* at 768. It recognized that this Court recently reiterated that a union could not, "consistently with the Constitution", collect compulsory fees for such ends unrelated to the legislative purpose to require the employees of a bargaining unit to share the exclusive representative's costs in negotiating and administering an agreement. *Beck* at 26-30, citing *Ellis v. Railway Clerks*, 104 S. Ct. 1883 (1984).

The court of appeals looked also at *Abood* where the state statute "allowed the union enjoying the rights under an agency contract to collect dues which could be used for lobbying or political purposes." *Beck* at 45-46. Because Michigan law permitted expenditures under the agency shop agreement for legislative lobbying, "the Supreme Court invalidated on First Amendment grounds the Michigan statutory authorization for the use of fees collected from an objecting employee for such purposes." *Beck* at 30, citing *Abood* at 215, 235-36. On the other hand, it found that this Court approved the statutory authorization to require reimbursement of union expenditures "'for the purposes of collective bargaining, contract administration, and grievance adjustment.'" *Beck* at 30, quoting *Abood* at 225-26.

Thus, the court of appeals concluded that

> [A] "service charge" may be collected to such extent as it is used to finance "expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment" but not for political or lobbying purposes.

Beck at 46, quoting *Abood* at 222, 225-26. In disallowing as a matter of law the entire category of "labor legislative expenditures" the court of appeals noted,

> In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. It is not easy to reconcile this decision with *Abood*.

Beck at 58 n.31. The Fourth Circuit recognized this Court's "significant statement" that

> "The differences between public and private-sector collective bargaining simply do not translate into differences in First Amendment rights."

Beck at 46-47, quoting *Abood* at 232.

The decision below does "translate into differences in" First Amendment rights to be free of governmental compulsion to advance union political causes. As a result of that decision petitioner has been, and is being, forced to subsidize the legislative activities of a union. That is not only abhorrent to her conscience, but contrary to the precedents of this Court and the Court of Appeals for the Fourth Circuit. Petitioner has a legitimate grievance which requires a remedy. Her grievance and the great public interest in protecting the First Amendment warrant this Court granting her Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 85-684

IN THE

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OCTOBER TERM, 1985

JUDITH KRAMER,

Petitioner,

and

BOARD OF EDUCATION OF THE TOWN OF BOONTON,
BOONTON EDUCATION ASSOCIATION,
NEW JERSEY EDUCATION ASSOCIATION,

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

ROBERT E. ANDERSON, JR.,
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December 18, 1985

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No. 85-684

IN THE

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JUDITH KRAMER,

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NEW JERSEY EDUCATION ASSOCIATION,
and
PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE RESPONDENT PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

STATEMENT OF THE CASE

On November 30, 1981, Judith M. Kramer, a teacher, filed an unfair practice charge against the Board of Education of the Town of Boonton ("Board"), her employer, and an unfair practice charge against the Boonton Education Association ("Association"), her majority representative, and the New Jersey Education Association ("NJEA"), an Association affiliate, with the New Jersey Public Employment Relations Commission ("Commission"). Both charges challenged the legality and implementation of an agreement between the Board and the Association to deduct a representation fee from the paychecks of non-members of the Association (36-38a).[1]

On February 9, 1982, Kramer amended her charge against the Association and NJEA to claim that they violated constitutional guarantees of freedom of speech and association when they sought to enforce a representation fee system allegedly not limited to negotiations and contract administration costs (39a).

On May 17, 1982, the Director of Unfair Practices consolidated the cases and issued a Complaint and Notice of Hearing. Defendants filed Answers denying any statutory or constitutional violations (39-40a).

On September 13, 1982, Hearing Examiner Edmund G. Gerber conducted a hearing. At the outset, he quashed a subpoena duces tecum which would have required the Association and NJEA to produce all documents pertaining to the operation of the demand

and return system, calculation of the representation fee, computation of the refundable amount, and costs of collective negotiations, contract administration, and grievance processing from July 1980 to July 1982. He ruled that the Appeal Board established pursuant to *N.J.S.A.* 34:13A-5.6 had jurisdiction over challenges to the amount of representation fees and that the subpoenaed documents were not relevant to an unfair practice proceeding before the Commission. The parties then examined witnesses, introduced exhibits and filed briefs.

On March 25, 1983, the Hearing Examiner issued his report, H.E. No. 83-33, 9 *NJPER* 248 (¶14114 1983). He found that the Board, the Association and the NJEA violated the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, when a representation fee was deducted for the month of September 1981 although the Association's demand-and-return system was not in place until October; he recommended a refund of the September fee with interest and a notice. He recommended the Complaint's dismissal in all other respects (40-41a).

Kramer, the Association and the NJEA filed exceptions (41-43a). The Commission granted, but Kramer then withdrew, a request for oral argument.

On July 18, 1983, the Commission issued its decision (36-84a). The Commission reviewed its jurisdictional limits and determined that the courts would decide the statute's constitutionality, the Appeal Board would decide challenges to representation fee amounts and impermissible expenditures, and the Commission would decide alleged unfair practices concerning statutory preconditions to deductions

(55-71a). Within its narrow statutory jurisdiction, the Commission held that the deduction of September 1981 dues was an unfair practice and found several other unfair practices. It found that the Association also violated the Act when it sent non-members ambiguous and misleading letters concerning membership; grudgingly responded to inquiries concerning the representation fee system (73-74a), and failed to notify each non-member personally of his rights and the applicable rebate procedures (75-76a). It found that the NJEA also illegally refused to allow non-members to pay their fees in an advance lump sum (76-78a). The Commission dismissed the remaining allegations.

Petitioner has misstated some of the Commission's holdings.

The Commission did not find that the statute "authorized as the exclusive [rebate] procedure the union's internal demand-and-return system." (7p). Rather the Commission held that a rebate procedure, given at least a 15% advance reduction, would be statutorily permissible provided the majority representative bore the burden of proof, the review proceedings were fair and full and the proceedings recognized a right of appeal to the Appeal Board. The Commission declined to determine whether this procedure excluded immediate recourse to the courts for fee challenges (68-69a, n. 28).

Nor did the Commission reject petitioner's contention that due process required pre-taking proceedings (7p). Rather the Commission declined to pass on any constitutional issues (69-70a).

Nor did the Commission find the legislature specifically authorized compelled support of lobbying "to secure advantages *in addition* to those secured through its collective negotiations with the public employer." (7p). Rather *N.J.S.A.* 34:13A-5.5(c) (95-96a) authorizes lobbying "to secure advantages *in wages, hours and other conditions of employment* in addition to those secured through collective negotiations with the public employer." (Emphasis added). This wording links the employees' vital interests in fundamental terms and conditions of employment with the action necessary to advance those interests (25-26a).[2]

Kramer appealed. The New Jersey Supreme Court certified the matter (3a).

On June 25, 1985, the New Jersey Supreme Court modified and affirmed the Commission's judgment (2-34a). The court affirmed all the Commission's statutory, jurisdictional and procedural rulings, but added these narrowing statutory constructions in light of the constitutional arguments: (1) lobbying supported by representation fees must be relevant to the occupational interests of unit employees (28-29a), (2) the annual representation fee must exclude the percentage of the prior year's budget attributable to non-chargeable expenses, and (3) any demand-and-return system must be simple, efficient and accessible. Given the Commission's statutory rulings and its own, the court held the statute facially constitutional (34a).

Petitioner has misstated one of the supreme court's holdings. Petitioner states that the supreme court left to union discretion the specific means to reduce the

risk of unconstitutional use of fees (9p); the implication is that this discretion will not be confined. The courts, however, will consider challenges to demand-and-return systems as applied (33-34a), the Appeal Board will review challenges to fee amounts and impermissible expenditures, and the Commission will find an unfair practice if a majority representative maintains its demand-and-return system unfairly, slowly or discriminatorily (72a, n. 31).

ARGUMENT

1. *The Commission Did Not Rule on the Constitutional Merits, But Believes the Statute is Constitutional. Its Statutory Rulings May Not Be Reviewed.*

An administrative agency must deem a statute it administers constitutional until the statute is finally declared unconstitutional and void. *Johnson v. Robison,* 415 *U.S.* 361 (1974). The Commission thus properly quashed Kramer's subpoena duces tecum and declined to pass upon her constitutional claims. Given that holding, the Commission will merely state its belief that the representation fee statute is facially constitutional for the reasons expressed by the New Jersey Supreme Court in this case and the Third Circuit Court of Appeals in *Robinson v. New Jersey,* 741 *F.*2d 598 (3d Cir. 1984), *cert. denied,* 105 *S.Ct.* 1228 (1985). *See also Champion v. Deukmejian,* 738 *F.*2d 1082 (9th Cir. 1984), *cert. denied,* 105 *S.Ct.* 1230 (1985); *San Jose Teachers Ass'n v. Superior Court of Santa Clara County,* 38 *Cal.*3d 839, 700 *P.*2d 1252, 215 *Cal. Rptr.* 250 (1985), *petition for cert. filed sub nom. Abernethy v. San Jose Teachers Ass'n,* 54 *U.S.L.W.* 3229 (U.S. Sept. 23, 1985) (No. 85-498).

The Commission also opposes certiorari to the extent any statutory interpretations might be challenged. These interpretations may not be reviewed. *Murdock v. Memphis,* 87 *U.S.* 590 (20 Wall 1875). Some of these statutory rulings—for example,

personal notice of rebate rights and procedures and reductions based on last year's budget—have the side effect of protecting non-members' constitutional interests.[3]

Finally, petitioner's arguments appear to rest in part on one unestablished premise: a union-controlled demand-and-return system is an obligatory and exclusive method for contesting a fee. The Commission declined to decide that issue (68-69a, n. 28) and perhaps a representation fee payer could go directly to court. Also, any demand-and-return system must culminate in an appeal to a tripartite Appeal Board with a strictly impartial chairman representing the public interest, and two other members representing employers and employee organizations. Finally, any demand-and-return system will, upon challenge, be scrutinized by the New Jersey courts to insure constitutional compliance, the Appeal Board to insure that the fee amount and expenditures are statutorily permissible, and the Commission to protect against statutory unfair practices.

CONCLUSION

The Commission did not rule on any constitutional claims, but believes the representation fee statute is constitutional. It also opposes certiorari to the extent, if any, its statutory rulings might be challenged.

Respectfully yours,

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

By:
ROBERT E. ANDERSON, JR.
General Counsel

DATED: TRENTON, NEW JERSEY
December 18, 1985

FOOTNOTES

1. References to Petitioner's appendix are designated by "a," references to her petition by "p," and references to the Commission's appendix as "PERCa."

2. Nor was the Commission a defendant in the federal litigation (7p); only the Chairman was. The preliminary injunction did not apply to him and plaintiffs dismissed him (PERCai-iv).

3. The Commission agrees with the supreme court (31a) that the validity of the abandoned demand-and-return system is no longer an issue.

APPENDIX A-1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
No. 82-1119 (DRD)

JOSEPH W. ANTONACCI, et al.;

Plaintiffs,

-v.-

STATE OF NEW JERSEY, et al.,

Defendants.

STIPULATION OF DISMISSAL

1. Plaintiffs filed a Complaint in the above matter against several defendants, including James W. Mastriani, Chairman of the New Jersey Public Employment Relations Commission.

2. Defendant Mastriani has filed an action for summary judgment.

3. Plaintiffs' attorney, Nelson R. Kieff, has agreed to dismiss defendant James W. Mastriani from this suit with prejudice.

4. Defendant Mastriani's attorney, Robert E. Anderson, Jr., has agreed in return to withdraw the motion for summary judgment.

PLAINTIFFS: JOSEPH W. ANTONACCI, MEVERIL JONES, THOMAS GAY, JOHN RUSSELL, RICHARD H. TREXLER, A. WILLIAM ONDER, LEON MATELSKI, EDWARD JAKUBCO, DOROTHY GRAY AND WILLIAM F. GRAY

BY: s/ Nelson R. Kieff,
NELSON R. KIEFF

DEFENDANT: JAMES W. MASTRIANI, CHAIRMAN, PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: s/ Robert E. Anderson, Jr.
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APPENDIX A-2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
No. 82-1118 (DRD)

PAUL H. ROBINSON, et al.,

Plaintiffs,

-v.-

STATE OF NEW JERSEY,et al.,

Defendants.

STIPULATION OF DISMISSAL

1. Plaintiffs filed a Complaint in the above matter against several defendants, including James W. Mastriani, Chairman of the New Jersey Public Employment Relations Commission.

2. Defendant Mastriani has filed a motion for summary judgment.

3. Plaintiffs' attorney, Nelson R. Kieff, has agreed to dismiss defendant James W. Mastriani from this suit with prejudice.

4. Defendant Mastriani's attorney, Robert E. Anderson, Jr., has agreed in return to withdraw the motion for summary judgment.

PLAINTIFFS: PAUL H. ROBINSON, CLIFFORD OWENS, PAUL B. KELLEY, ALLAN ROTH, CALVIN W. CORMAN, EARL MALTZ, ELIHU ABRAHAMS, ARNOLD GLASS, CHARLES W. UPTON, ALEX W. WYPYSZINSKI, MICHAEL CREW, HAROLD ZAPOLSKY, AND JACKSON TOBY

BY: s/ Nelson R. Kieff
NELSON R. KIEFF

DEFENDANT: JAMES W. MASTRIANI, CHAIRMAN, PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: s/ Robert E. Anderson, Jr.
ROBERT E. ANDERSON, JR.

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No. 85-684

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BOARD OF EDUCATION OF THE TOWN OF BOONTON and
NEW JERSEY PUBLIC EMPOYMENT RELATIONS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the New Jersey Supreme Court was correct in concluding that the New Jersey Employer-Employee Relations Act is not facially unconstitutional because it authorizes a union to expend representation [*i.e.*, agency] fees, over objection, for "lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer."

2. Whether the New Jersey Supreme Court was correct in concluding that the New Jersey Employer-Employee Relations Act is not facially unconstitutional because it fails to require a *pre*-collection governmental determination of the amount of the representation fee that may be charged to objecting employees.

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IN THE

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JUDITH KRAMER,

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BOARD OF EDUCATION OF THE TOWN OF BOONTON and
NEW JERSEY PUBLIC EMPOYMENT RELATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Boonton Education Association, New Jersey Education Association and Board of Education of the Town of Boonton, submit that the Petition for a Writ of Certiorari should be denied, and file this brief in opposition to the Petition.

STATEMENT OF THE CASE

A. This case involves a constitutional challenge to the facial validity of certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-2, *et seq.* (New Jersey Act), which is the statute that regulates New Jersey's public sector labor relations. The New Jersey Act authorizes a public employer and the union that has been selected as the majority representative of its employees to include in their collective bargaining agreement a provision requiring employees who are covered by the agreement, but who choose not to join the union, to pay "a representation fee in lieu of dues for services rendered by the" union. N.J.S.A. 34:13A-5.5a.[1] This representation fee may not exceed 85% of regular membership dues. N.J.S.A. 34:13A-5.5b. Additionally, nonmembers have the right to demand and receive from the union the return of any part of their fee that would be expended for "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." The Act expressly provides, however, that the returnable amount need not include:

> the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer. N.J.S.A. 34:13A-5.5c.

Under the New Jersey Act, a union is entitled to receive representation fees only if it "has established and maintained a demand and return system which provides

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[1] Although this type of cost-sharing arrangement is most commonly referred to as an "agency fee", the precise terminology used to describe it varies from jurisdiction to jurisdiction (*e.g.*, "fair share fee", "service fee", etc.). Because it is referred to as a "representation fee" in New Jersey, we use that designation here.

pro rata returns" to objecting employees of the amount that otherwise would be used for "nonchargeable" expenditures. The system must provide for "review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative," and "an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate . . ." *Id.* The decisions of this board in turn may be appealed to the state courts.

At issue in this case are the provisions of the New Jersey Act that (1) authorize the use of representation fees, over objection, to defray the costs of the specified employment-related lobbying, and (2) regulate the demand and return systems.

B. The New Jersey Supreme Court used two basic guidelines in defining its decision-making function in this case. The Court stated first that it considered both aspects of petitioner's challenge "to be directed to the facial validity of the statute. . . ." App. 13a.[2] Second, in assessing the facial validity of the challenged provisions, the court indicated that its "clear duty is to construe the statute in a manner that would uphold its constitutionality if it is reasonably susceptible to such a construction." App. 17a.

Dealing first with the lobbying issue, the New Jersey Supreme Court construed the New Jersey Act as authorizing the use of representation fees, over objection, *only* for lobbying activities that are "germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours, and other condi-

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[2] As far as the lobbying issue was concerned, the court below noted that "[t]he record before us does not permit consideration of the precise manner in which the statutory authorization to collect and expend the representation fee was implemented." App. 13a-14a. With regard to the second issue, "the Court was advised at oral argument that the . . . demand-and-return system introduced into evidence has since been terminated and replaced with a new demand-and-return system, which is not part of the record." *Id.*

tions of employment," App. 28a, and held that this statutory authorization "is not facially invalid since it furthers the State's significant interest in public-employment stability without encroaching impermissibly on the rights of free speech and association that are protected by the first amendment to the United States Constitution . . . ." App. 29a. The court added that "[i]n the context of this facial challenge to the Act, we do not now attempt to forecast the various objectives of lobbying activities that will or will not meet this standard." App. 28a.

The New Jersey Supreme Court then turned to the facial validity of the statutory provisions regulating demand-and-return systems. Focusing specifically on the first amendment concern expressed by this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Railway Clerks*, 104 S.Ct. 1883 (1984), the court below concluded that the requirements for demand-and-return systems expressly set forth in the New Jersey Act itself, as "[s]upplemented by the procedural safeguards that we have determined are required to achieve the legislative purpose of the Act," App. 34a, are sufficient to prevent the unconstitutional use of the fees of objecting employees during the pendency of challenges to the amount collected. Accordingly, the court sustained the facial validity of the challenged provisions, and since their facial validity was the only issue, it made no attempt to "decide in advance what refinements may be required to" achieve a statutorily acceptable demand-and-return system, noting simply that "any challenges to such systems must be measured by the standards imposed by the statute as construed here." App. 34a.

REASONS FOR DENYING THE WRIT

The New Jersey Supreme Court made two constitutional rulings in this case: (1) a union may use representation fees, over objection, to help finance the employment-related lobbying specified in the New Jersey Act,

and (2) under the statutory provisions regulating demand-and-return systems, as construed, it is possible for a union to develop a constitutionally adequate system. Neither of these rulings warrants further review. They represent a proper application of this Court's agency fee decisions to the facts of this case, establish no new principles of federal law, and are not in conflict with the rulings of a federal court of appeals or another state court of last resort.

I. THE NEW JERSEY SUPREME COURT CORRECTLY APPLIED THE TEACHINGS OF *ABOOD* AND *ELLIS* TO THE REALITIES OF NEW JERSEY'S PUBLIC SECTOR LABOR RELATIONS IN CONCLUDING THAT THE ACT'S AUTHORIZATION OF THE USE OF REPRESENTATION FEES FOR THE DEFINED EMPLOYMENT-RELATED LOBBYING IS NOT UNCONSTITUTIONAL ON ITS FACE.

This Court's decisions establish that it is constitutional to require members of a bargaining unit, over their objection, to support union activities that are related to collective bargaining. As this Court put it in *Ellis v. Railway Clerks, supra,* at 1892:

> [W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Petitioner does not directly address the New Jersey Supreme Court's application of the foregoing standard to the employment-related lobbying authorized by the New Jersey Act. Discussing the issue only in the most abstract and general terms, she asserts simply that "[t]he very process of lobbying the government to make or change law constitutes speech on 'matters of public concern . . . at the heart of the First Amendment's protection.'" Petition at 13. What petitioner appears to be suggesting is that the crucial distinction for constitutional purposes is the forum in which the expenditure is made rather than the subject matter. But there is nothing in *Ellis* or any of this Court's other representation fee decisions to support this position. Indeed, the teaching of these decisions is precisely to the contrary.

This Court has recognized that employees may "seek to improve working conditions through resort to" various forums, including specifically "appeals to legislators to protect their intersts as employees. . . ." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Although unions in both the public and private sectors engage in lobbying to further the interests of the employees whom they represent, resort to the legislative forum is especially important in the public sector because of the extent to which the conditions of public employment are controlled by statute. As this Court noted in *Abood*, "[t]he process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236.

The New Jersey Supreme Court took account of this practical reality, and after an examination of collective bargaining in New Jersey, concluded that the employment-related lobbying authorized by the New Jersey Act is a necessary part of that state's public sector labor relations system:

The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective-negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and regulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined by statute and a public employee union that ignored this reality would not represent properly the members and nonmembers in its bargaining unit. *See Abood, supra*, 431 U.S. at 227-32, 97 S.Ct. at ——, 52 L.Ed. 2d at 279-81; C.W. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking," 44 Cin. L. Rev. 669 (1975). Respondent unions can readily identify a number of state statutes that directly affect conditions of employment for public school teachers and that would appear to be likely subjects for lobbying activity. *See, e.g.*, N.J.S.A. 18A:66-1 to -192 (Teachers Pension and Annuity Fund); N.J.S.A. 18A:28-1 to -17 (tenure); N.J.S.A. 18A:6-30 and -30.1 (compensation for wrongful suspension or discharge); N.J.S.A. 18A:27-1 to -13 (hiring, contracts, evaluation of nontenured teachers, continuation and termination of employment, and authorization of school board rules governing employment of teachers); and N.J.S.A. 18A:30-1 to -8 (sick leave and work related disabilities). App. 25a-26a.[3]

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[3] Statutes and regulations that establish conditions of employment in the New Jersey public sector often are incorporated by reference into collective bargaining agreements, *New Jersey v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233, 246 (1978), and made subject to the agreement's grievance procedure, *Township of West Windsor v. PERC*, 78 N.J. 98, 393 A.2d 255, 264 (1978). Thus, not only are New Jersey public employees bound by such statutes and regulations, but public employee unions also become responsible for enforcing their provisions through

The New Jersey Supreme Court then turned to this Court's decisions in *Abood* and *Ellis*, and summarized the lesson to be drawn from those decisions in the following terms:

> As the United States Supreme Court noted in *Ellis* and *Abood*, any requirement that a nonunion member pay a fee to the union impinges upon that individual's first amendment rights of free speech and association. That impact is constitutionally permitted only when the fee is used for objectives germane to collective negotiations or conditions of employment, because the collection of nonmember fees for these purposes promotes the governmental interest in achieving stability in labor relations. App. 27a.

Declaring that its "obligation is to construe the [New Jersey] statute in a manner that is not repugnant to first-amendment protections," the court below held "that the lobbying activities authorized by N.J.S.A. 34:13A-5.5 must be germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours, and other conditions of employment in order to invoke the State's interest in achieving stability in public-employee labor relations," App. 28a. And it unanimously concluded that, "[a]s construed, . . . the statute is not facially invalid . . .," App. 29a, a conclusion that falls squarely within the four walls of *Abood* and *Ellis*.

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the contractual grievance procedure. *See Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 268 (1970).

It is, moreover, a common practice in the New Jersey public sector for unions and employers to include in their collective bargaining agreements a provision requiring joint union-employer lobbying efforts to secure statutory or regulatory changes that may be a precondition to the implementation of other provisions in the agreement, and this practice has been approved by the New Jersey courts. *See Policemen's Benevolent Ass'n v. PERC*, 187 N.J. Super. 202, 453 A.2d 1373 (App. Div. 1982), *cert. denied*, 93 N.J. 269, 460 A.2d 672 (1983).

This is not the first time that this Court has been asked to review a lower court's determination that the lobbying provision of the New Jersey Act promotes the state's interest in labor peace and stability and does not unnecessarily burden the first amendment rights of objecting employees. In *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), the 3rd Circuit considered the same constitutional challenge that is asserted here. This Court denied certiorari, —— U.S. ——, 105 S. Ct. 1228.

The holding in *Robinson* is consistent with that in *Champion v. State of California*, 738 F.2d 1082, 1085-86 (9th Cir. 1984), in which the 9th Circuit sustained the facial constitutionality of a provision in the California State Employer-Employee Relations Act, Cal. Gov't. Code, §§ 3515.7(a) *et seq.*, authorizing a union to use the representation fees of objecting employees for the same type of employment-related lobbying as does the New Jersey Act. This Court likewise denied certiorari in *Champion*, —— U.S. ——, 105 S.Ct. 1230 (1985).

The only other case in which a court of appeals has considered whether a union may use the representation fees of objecting employees for lobbying is *Beck v. Communication Workers*, 120 LRRM 2957 (Oct. 24, 1985). In *Beck*, the 4th Circuit affirmed the decision of the district court approving a special master's disallowance of the Communications Workers of America's (CWA) expenditure of objecting employees' fees for "labor legislation" pursuant to a union security provision negotiated under § 8(a)(3) of the Labor Management Relations Act. *Beck* was decided after petitioner had filed her Petition for Certiorari in this case, and she filed a Supplemental Brief, asserting that the decision of the 4th Circuit creates an "obvious split in the circuits on this vital issue of First Amendment concern." Supplemental

Brief at 2.[4] This assertion is incorrect, for, as we now show, *Beck* is totally compatible with *Robinson* and *Champion*, as well as with the decision of the court below in the instant case.

In sustaining the position taken by the special master *vis-a-vis* CWA's expenditures for "labor legislation," the 4th Circuit commented as follows:

> This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of 'lobbying efforts' by CWA 'far remote . . . from collective bargaining, contract negotiation and grievance adjustment,' for instance, 'lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment.' He suggested that there might have been some areas such as 'the Telecommunications Act or Occupational Health and Safety Regulations' where 'lobbying' would have some relevance, but the special master said CWA had made no effort to identify any such permissible 'lobbying activities' or to offer any evidence in support. The disallowance seems justified under *Abood*. 120 LRRM at 2975.

As the foregoing summary makes clear, the special master established (and the 4th Circuit endorsed) essentially the same dividing line between chargeable and non-chargeable lobbying as did the New Jersey Supreme Court in this case, the 3rd Circuit in *Robinson*, and the 9th Circuit in *Champion*. The counterpart language by the court below is as follows:

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[4] Although *Beck* was a private sector case, in which the precise issue was whether the expenditures in question were appropriate under the statutory standard set forth by Congress in the Labor Management Relations Act, the 4th Circuit stated that "[t]he disallowance seems justified under *Abood*," 120 LRRM 2975, which, according to petitioners, indicates that it found these expenditures impermissible as a matter of first amendment law. For purposes of the textual analysis, it is assumed that the 4th Circuit was in fact applying a constitutional standard.

> The more removed the objectives of such lobbying are from collective negotiations or conditions of employment [*e.g.*, 'the adoption of the Panama Canal Treaty, and the Equal Rights Amendment'] the less likely it is that such lobbying activities can be financed by involuntary nonmember fees. As the United States Supreme Court noted in *Ellis* and *Abood*, any requirement that a nonunion member pay a fee to the union impinges upon that individual's first-amendment rights of free speech and association. That impact is constitutionally permitted only when the fee is used for objectives germane to collective negotiations or conditions of employment [*e.g.*, 'the telecommunications Act or Occupational Health and Safety Regulations'], because the collection of nonmember fees for these purposes promotes the governmental interest in achieving stability in labor relations. App. 27a.

And in *Robinson*, the 3rd Circuit indicated that objecting employees could only be charged for lobbying expenditures that "are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union," 741 F.2d at 609.

In sum, the New Jersey Supreme Court, the 3rd Circuit, the 9th Circuit, and the 4th Circuit all tracked this Court's analysis in *Abood* and *Ellis* in distinguishing between chargeable and non-chargeable lobbying. Although the special master disallowed all of the lobbying expenditures in *Beck*, he did so because "CWA had made no effort to identify any such permissible 'lobbying activities' or to offer any evidence in support." 120 LRRM at 2975. The ability of the union to meet its evidentiary burden is, of course, not a relevant consideration here, since, as the New Jersey Supreme Court noted, "[i]n the context of this facial challenge to the Act, we do not now attempt to

forecast the various objectives of lobbying activities that will or will not meet this standard." App. 28a.[5]

There is no need to belabor the point. Neither *Abood*, *Ellis*, nor any other representation fee decisions of this Court or any federal court of appeals supports the proposition that a union categorically is prohibited from expending representation fees, over objection, for lobbying. The proposition that these decisions *do* support was aptly set forth by the 3rd Circuit in *Robinson*, when it stated that:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideologi-

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[5] Petitioner does not in her Supplemental Brief even refer to the distinction recognized in *Beck* between employment-related and non-employment-related lobbying, or to the fact that the decision in that case turned on CWA's failure to demonstrate that its lobbying expenditures fell on the chargeable side of the line. Petitioner states simply that the 4th Circuit "disallow[ed] as a matter of law the entire category of 'labor legislative expenditures'," Supplemental Brief at 4, and then, in support of this disingenuous statement, quotes as follows from a footnote in the court's opinion:

> In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. *It is not easy to reconcile this decision [with] Abood.* Supplemental Brief at 4, citing *Beck*, 120 LRRM at 2975, n.31 (emphasis added).

Although the underscored sentence suggests that the 4th Circuit may not fully have appreciated the narrowly-defined range of employment-related lobbying approved by the 3rd Circuit, the significance of this comment for present purposes is in any event undercut by the final sentence of the footnote, which petitioner fails to quote. This sentence reads as follows:

> However, we are not here concerned with public employees and the unique considerations which influenced the decision in *Robinson* are not present here.

It is, of course, these same "unique considerations" of public sector labor relations that inform the decision of the New Jersey Supreme Court in this case.

> cal positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees. 741 F.2d at 609.

The New Jersey Act reflects this teaching, and is not facially unconstitutional because it authorizes a union to expend the representation fees of objecting employees for a narrowly defined range of employment-related lobbying. Accordingly, this aspect of the New Jersey Supreme Court's decision does not warrant review by this Court.

II. THE NEW JERSEY SUPREME COURT WAS CORRECT IN CONCLUDING THAT, UNDER THE ACT AS CONSTRUED, IT IS POSSIBLE FOR A UNION TO DEVELOP A CONSTITUTIONALLY ACCEPTABLE DEMAND-AND-RETURN SYSTEM.

At the threshold, it bears emphasis that the New Jersey Supreme Court did not rule on the adequacy of any particular demand-and-return system. Because "the demand-and-return system in evidence . . . was repealed before oral argument, and the replacement system is not in the record before us," the court below viewed petitioner's challenge as "limited to the facial validity of the statutory provisions requiring the adoption of a demand-and-return system." App. 31a. Accordingly, the question that the court below addressed, and unanimously answered in the affirmative, was whether it was possible to construe those provisions in a manner that would enable a union to develop a constitutionally adequate demand-and-return system.

The New Jersey Supreme Court considered the facial validity of the challenged provisions "in the context of first-amendment guarantees." App. 13a. Referring specifically to the concern expressed by this Court in *Abood* and *Ellis*, it construed the New Jersey Act as prohibiting a "pure rebate approach," which would allow a union "annually to expend nonmember representation fees for political lobbying activities not permitted by the statute

and thereafter to refund the portion of the fee improperly expended upon demand by an objecting nonmember." App. 29a, 32a. In order for a demand-and-return system to pass muster under the Act, the court stated, the maximum fee charged to an objecting employee "for the current year would be an amount equal to membership dues reduced by the percentage of impermissible expenditures in the prior year's budget [but] [i]n no event may the nonmember fee exceed 85% of the dues charged to members." App. 33a, n.5. The court recognized, however, that this reduction might not, in and of itself, be sufficient for a demand-and-return system to satisfy the requirements of the Act, and stated that "[r]efinements of the statutory demand-and-return system can undoubtedly be devised to reduce even further the risk of unconstitutional uses of nonmembers fees," citing by way of illustration this Court's reference in *Ellis* to "the adoption of interest-bearing escrow accounts. . . ." App. 33a. Additionally, the court below observed that:

> The demand-and-return system itself, beyond the statutory requirement that the burden of proof be on the majority representative, must provide an uncomplicated, efficient, and readily accessible process for contesting the representation fee. Such a process must contain no features or conditions that would in any manner inhibit or restrain a nonmember from utilizing it. App. 34a.

The New Jersey Supreme Court concluded that the requirements for demand-and-return systems expressly set forth in the New Jersey Act itself, as "[s]upplemented by the procedural safeguards that we have determined are required to achieve the legislative purpose of the Act," App. 34a, are sufficient to prevent the unconstitutional use of the fees of objecting employees during the pendency of challenges to the amount collected.[6] It held,

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[6] In *Robinson*, the 3rd Circuit concluded that the demand-and-return systems implemented by the defendant unions "incorporate

therefore, that no first amendment problems are presented by these provisions of the New Jersey Act.

Petitioner makes no attempt to dispute this holding. Instead, she shifts ground, arguing that regardless of whether the demand-and-return systems required by the New Jersey Act are sufficient to protect first amendment rights of free speech and association, the due process clause requires more to protect adequately the "liberty and property interests" of objecting employees. Petition at 17. Petitioner puts her argument this way:

> [The New Jersey Supreme Court] left the burden upon the non-union employee, rather than the government or union, to come forward and take lengthy steps to protect *her liberty and property interests.*

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both of the protective mechanisms approved in *Ellis*"—*i.e.*, by statute, there is a fifteen percent "advance reduction" and "each of the defendant-unions has created an escrow system for a portion of the representation fee." *Id.* at 612. Under the New Jersey Act, as construed by the court below, the advance reduction is not simply 15%—it is rather "the percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to [dissenting] nonmembers," but "[i]n no event may the nonmember fee exceed 85% of the dues charged to members." App. 33a, n.5. Nor is the escrow account necessarily limited to "a portion of the [reduced] representation fee." The court below indicates only that "the adoption of interest-bearing escrow accounts [are] a means of preventing the actual use of nonmembers funds during the pendency of challenges to proposed expenditures," App. 33a, which does not preclude the possibility that the court may, when confronted with a challenge to the validity of a specific demand-and-return system, construe the New Jersey Act as requiring that an objector's entire fee be placed in escrow, and prohibit any expenditure of that money until the objector has the right to a full evidentiary hearing before the appeal board and/or the state courts.

Moreover, the construction that the New Jersey Supreme Court has given to the New Jersey Act moots the constitutional question, raised by the partial dissent in *Robinson*, of whether the 15% advance reduction required by the Act would by itself be constitutionally sufficient.

> Thus, it denied Petitioner a procedure where there is adequate pretaking notice to affected individuals and where the union must *factually establish* the validity of its mandatory fees before a neutral governmental body prior to any deductions. *Id.* (first emphasis added).

In short, the fatal defect in the decision of the court below, according to petitioner, is that it did not construe the New Jersey Act to require a *pre*-collection governmental determination of the amount that may be expended over objection.

Before addressing petitioner's due process argument on its own terms, we note that the result she seeks—*i.e.*, the functional equivalent of an injunction against the collection of any fees *pendente lite*—would uproot a principle of representation fee law that has been firmly established by this Court's decisions. This Court has made it abundantly clear that the one remedy that is not appropriate in representation fee cases is an injunction that relieves objecting employees of the obligation to provide *any* fiscal support to the union that represents them. As this Court explained almost twenty-five years ago in *Machinists v. Street*, 367 U.S. 740, 771 (1961), an injunction restraining fee collection:

> sweeps too broadly . . . [and] might well interfere with the . . . union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

This position was reaffirmed in *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963) ("an injunction relieving dissenting employees of all obligation to pay the monies due under a [union security] agreement . . . was impermissible."). And in *Abood*, even though the Michigan statute at issue had been construed by the state court as providing objectors with no protection against use of their fees for partisan political purposes, 431 U.S. at

232-233, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.* at 240-41.[7] Yet the import of petitioner's present argument is that if an objector invokes "liberty and property interests" under the due process clause, the union is precluded from collecting *any* money from that objector unless and until it has "*factually establish*[ed] the validity of its mandatory fees before a neutral governmental body. . . ." Petition at 17 (emphasis in original).

Petitioner's argument also flies in the face of this Court's analysis in *Ellis*. After indicating that a union is prohibited from "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place" (*i.e.*, a "pure rebate approach"), the *Ellis* Court identified two alternative procedures that would be constitutionally acceptable:

> [T]here are readily available alternatives [to a pure rebate approach] such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. 104 S.Ct. at 1890.

Inasmuch as one of these *constitutionally acceptable* alternatives—*i.e.*, interest-bearing escrow accounts—presupposes that the determination by "a neutral governmental body" of the amount that may be charged to objecting employees will take place *after* collection, it would, under petitioner's theory, become *constitutionally unacceptable* whenever an objector asserts a due process claim.

In short, the clear teaching of this Court's representation fee jurisprudence is that a pre-collection govern-

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[7] There is, of course, nothing to prevent a state from deciding, on policy as opposed to constitutional grounds, to deny a union access to any portion of the objectors' fees until after a governmental hearing has taken place, either by requiring a 100% escrow or otherwise. *Cf.*, n.6, *supra*; *School Committee of Greenfield v. Greenfield Ed. Assn.*, 385 Mass. 70 (1982), *infra*, at p. 20.

mental determination of the amount that may be charged to objecting employees is *not* a *sine qua non* for a constitutionally acceptable demand-and-return system, and no federal or state appellate court ever has held otherwise. To the extent petitioner cites *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, 105 S.Ct. 2700 (1985), and *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-82 (1982), for a contrary proposition, she is mistaken.[8]

In *Hudson*, after finding that "[t]he procedure that the defendants adopted in this case is constitutionally inadequate," the 7th Circuit indicated that "they must go back to the drawing board" and offered the following "guidance" as to the type of procedure that, in its opinion, would be constitutional:

> [W]ithout wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. 743 F.2d at 1196.

At oral argument, the union's counsel informed the 7th Circuit that "after this case was brought the union

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[8] It is not entirely clear whether petitioner is in fact contending that the 7th Circuit or the Massachusetts Supreme Judicial Court held that a pre-collection determination is constitutionally required. Petitioner simply states that:

> [In these cases] the courts focused expressly on the constitutional duty of government to provide an advance determination of an assessment by a governmental decisionmaker. These decisions advance the salutary purpose 'to devise a way of preventing compulsory subsidization of ideological activity' and to avoid the dubious choice to relinquish either one's 'right to withhold' support or 'freedom to maintain [one's] own beliefs.' *Abood*, 431 U.S. at 241, 244.

Petition at 19.

began voluntarily placing dissenters' agency fees in escrow," *id.* at 1197. In response to this information, the court observed:

> This was a step in the right direction but does not make the issue moot. The union has made no commitment to continue to place such fees in escrow. The terms cannot be left entirely up to the union. The union might decide, for example, to forgo a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time). It would be best if the union turned management and not just custody of the account over to a bank or trust company. But we need not go into those details here. It is enough to hold that a proper escrow arrangement is required in order to protect the dissenters' constitutional rights. *Id.*

These comments by the 7th Circuit hardly support petitioner's pre-collection determination argument. For if it were true that representation fees may not be collected until *after* there has been a governmental determination of the amount that constitutionally may be charged to objectors, it would be pointless to consider, as *Hudson* does, the elements of a "proper escrow arrangement."[9]

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[9] Inasmuch as *Hudson* presently is pending before this Court, it is important to point out that there is nothing in the New Jersey Supreme Court's construction of the New Jersey Act that would preclude a union from developing a demand-and-return system that meets the constitutional standards set forth in *Hudson*. The fulcrum of the 7th Circuit's decision was its conclusion that the statute at issue there did not provide for either an administrative hearing before a neutral body or judicial review. 743 F.2d at 1196. In contrast, the New Jersey Act provides for review of the union's calculations by an appeal board appointed by the Governor, and for judicial review of the board's determination. Under the decision of the court below, a union also could establish what the 7th Circuit characterizes as "a proper escrow arrangement"—*i.e.*, one in which "the union turned management and not just custody of the account over to a bank or trust company." In the context of the facial challenge to the constitutionality of the Act, the New Jersey Supreme Court simply identified "interest-bearing escrow accounts as a means of preventing the actual use of nonmember funds during

There likewise is nothing in the *Greenfield* decision to suggest that a pre-collection determination is constitutionally required. To the contrary, the Massachusetts Supreme Judicial Court construed that state's representation fee statute as authorizing objecting employees to pay their fees into an escrow account pending a *post*-collection determination of the appropriate amount. 431 N.E.2d at 189-190.

In an apparent effort to avoid the force of this Court's representation fee precedents, petitioner, in her extended exegesis into due process, simply proceeds as if *Street*, *Allen*, *Abood*, and *Ellis* never had been decided.[10] Relying instead entirely on cases decided in other contexts, petitioner asserts that a " 'root requirement' of the Due Process Clause is 'that an individual be given an opportunity for a hearing *before* he is deprived' of protected interests," and "[t]hat requirement is especially applicable here." Petition at 18 (emphasis in original, citation omitted).

Although petitioner refers to a deprivation of both "liberty and property interests," Petition at 17, 18, the only possible deprivation of liberty that exists in the present context arises not as a result of the *collection* of representation fees, but as a result of the *expenditure* of those fees for impermissible purposes. As previously noted, however, the procedural safeguards that are available under the New Jersey Act as construed by the court below, including both an advance reduction and the possibility of a 100% escrow, are more than adequate to

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the pendency of challenges to proposed expenditures," App. 33a, but made no attempt to indicate the type of account that would be required "to achieve the constitutionally mandated objective." In short, the disposition of *Hudson* will have no bearing on the outcome of this case, and, accordingly, there is no reason for this Court to defer action on the instant Petition pending a decision in *Hudson*.

[10] Except for the inclusion of a reference to Justice Powell's concurring opinion in *Ellis* as part of a string-citation, see Petition at 18, petitioner does not even mention—much less treat with—these cases.

assure that there will be no deprivation of this liberty interest. Simply stated, then, petitioner's position is that the due process clause requires a pre-deprivation hearing whenever an individual is threatened with the deprivation of a property interest—in this case, the loss of the use of $37.08 per month during the ten-month school year. App. 6a. As we now show, this position certainly does not reflect this Court's due process holdings.

In the seminal case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court eschewed a fixed mechanical formula for determining in a particular case what due process requires and opted instead for a flexible generalized approach. Following this approach, the post-*Eldridge* cases consistently "reject[] the proposition that [due process] . . . *always* requires the State to provide a hearing prior to the initial deprivation of property," and affirm that "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 540, 538 (1981) (emphasis in original). Indeed, subsequent to *Eldridge*, this Court, on at least six occasions, has sustained the constitutionality of a *post*-deprivation hearing absent any *pre*-deprivation process. *Hewitt v. Helms*, 459 U.S. 460 (1983); *Parratt v. Taylor*, *supra*; *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977).[11]

The same due process argument that petitioner advances here was advanced in *Robinson*. In rejecting it, the 3rd Circuit commented as follows:

> Even assuming some cognizable harm occasioned by the temporary deprivation of a small amount of returnable fees exists, adequate post-deprivation procedures may suffice to withstand the constitutional

[11] Although *Eldridge* and its progeny are of controlling importance here, petitioner does not even cite *Eldridge*, much less conduct an *Eldridge* analysis.

> challenge. . . . In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court sanctioned the discontinuation of disability benefits prior to a full evidentiary hearing. The Court reasoned that the notice provisions of the challenged social security termination procedure combined with the 'fairness and reliability of the pre-termination procedures,' 424 U.S. at 343 . . ., rendered the likelihood of harm remote and the extent of actual harm, were it to occur, *de minimis*. [Citation omitted].
>
> Based upon *Mathews* and its progeny, we conclude that the constitutional infirmity of the demand and return systems, if any, depends on the adequacy of the return arrangements. . . . [T]he question is one of the due process protections in the assessment of the withholding and the adequacy of the post-withholding return systems. 741 F.2d at 611-612.

And the court of appeals did undertake such an assessment, concluding:

> An examination of the demand and return systems adopted by the defendant unions reveals that the principal protections required by *Ellis* and the *Mathews* due process case law are already in existence. *Id.* at 613.[12]

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[12] This same argument also was advanced and rejected in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982), *dismissing appeal from* 307 Minn. 976, 239 N.W.2d 437 (1976) and 316 N.W.2d 551 (1982). The issue in *Threlkeld* was whether the Minnesota representation fee statute "deprives an individual of property without providing procedural due process," 239 N.W.2d at 439. Plaintiffs argued there, as petitioner argues here, that "an individual's wages are a 'specialized type of property' and that, under *Sniadach* [*v. Family Finance Corp.*, 395 U.S. 337 (1969)], an individual must be accorded a prior hearing before deductions may be made from his wages," *id.* at 442. The Minnesota Supreme Court rejected plaintiff's contention as follows:

> A prior hearing is not the *sine qua non* of procedural due process since '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every

The conclusion that the 3rd Circuit reached in this regard is sound, and since the decision of the New Jersey Supreme Court allows for the development of demand-and-return systems that provide for procedural safeguards over and above those provided by the systems of the defendant unions in *Robinson*, petitioner's assertion that the New Jersey Act is unconstitutional because it does not require a pre-collection governmental determination of the amount that may be charged to objecting employees is patently without merit.

In sustaining the facial validity of the demand-and-return system provisions of the New Jersey Act, the court below has issued a ruling that is consistent with the relevant decisions of this Court and the decisions of all other appellate courts that have considered the procedural safeguards to which objecting employees constitutionally are entitled. This ruling does not warrant further review.

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imaginable situation.' *Mitchel v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). Again, it must be stressed that the procedural protection to which the individual is constitutionally entitled depends on the balancing of the interests in each particular case. . . . As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in [*Sniadach* and its progeny] and the state's interest in the collection of the [representation] fee is clearly more substantial . . . Consequently, since in the instant case the individual's interest is less significant and the state's interest is more substantial, the demands of procedural due process are correspondingly reduced. *Id.* at 444-45.

The plaintiffs in *Threlkeld* appealed to this Court, arguing in their jurisdictional statement that "even if First Amendment freedoms are not involved, a seizure of property under color of statute without a prior hearing is unconstitutional under the Due Process Clause," J.S. No. 81-2403 at 19-20. This Court concluded that the Minnesota Supreme Court's holding in *Threlkeld* did not raise a substantial federal question.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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